Supreme Court, U.S.
FILED
SEP 25 2000
OFFICE OF THE CLERK

No 00-513

IN THE

Supreme Court of the United States

LEVI STRAUSS & CO.,

Petitioner,

v.

AGUSTINA TREVINO, HERMINIA HERRERA, BEATRIZ OLIVAREZ AND GLORIA GUAJARDO,

Respondents.

On Petition for Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a workers' compensation discrimination claim under Tex. Labor Code § 451.001 "arises under" the state workers' compensation laws given the fact that Congress' purpose in enacting § 1445(c) was merely to prevent workers' compensation benefit claims from being removed to federal court.

2. Whether the Fifth Circuit erred in establishing a *per se* rule that a workers' compensation discrimination claim under Tex. Labor Code § 451.001 can never be preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a).

ALL PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceeding, with the exception of Mike Ramos, who was a defendant in the lower court proceedings. Levi Strauss & Co. is a Delaware corporation. It has no parent corporation and no publicly-held company owns 10 percent or more of Levi Strauss & Co.'s stock.

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Citation of Official Report of Opinion

Sought to be reviewed is a decision of the United States Court of Appeals for the Fifth Circuit, *Agustina Trevino, Herminia Herrera, Beatriz Olivarez and Gloria Guajardo v. Mike Ramos & Levi Strauss & Co.*, 197 F.3d 777 (5th Cir. 1999).

Statement of Basis for Jurisdiction

The Fifth Circuit rendered its decision on December 7, 1999. (App. 1) Thereafter, Levi Strauss & Co. timely filed a

petition for rehearing *en banc* which was denied by the Fifth Circuit in an order dated June 26, 2000. (App. 2) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment or decree of the Fifth Circuit.

Statutes Involved in the Case

Relevant provisions of the following three statutes are set forth in the Appendix: (1) Labor Management Relations Act, 29 U.S.C. § 185(a); (2) 28 U.S.C. § 1445(c); and (3) Texas Labor Code § 451.001. (App. 3)

Statement of the Case

a. Lower Court Proceedings

Plaintiffs Agustina Trevino, Herminia Herrera, Beatriz Olivarez, and Gloria Guajardo filed this action in state court against Levi Strauss & Co. ("LS&CO.") and LS&CO.'s Human Resources Manager, Mike Ramos, alleging workers' compensation discrimination, intentional infliction of emotional distress, and negligent hiring, supervision and retention. LS&CO. removed the case to federal court pursuant to 28 U.S.C. § 1331 on the ground that Plaintiffs' claims were preempted by § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), and thus presented a federal question. The district court found the intentional infliction claims preempted and denied Plaintiffs' motions to remand. The court subsequently concluded that the workers' compensation discrimination claims were not preempted, but retained supplemental jurisdiction over those claims and entered summary judgment for LS&CO. on the merits. The Plaintiffs timely appealed. The Fifth Circuit reversed the

district court's decision. LS&CO. subsequently filed a petition for rehearing *en banc*, which was denied on June 26, 2000.

b. Relevant Sections of CBA

All four Plaintiffs in this case worked as sewing machine operators at LS&CO.'s McAllen, Texas sewing plant. Their employment was governed by a collective bargaining agreement ("CBA") between LS&CO. and the Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC, which contained detailed provisions regarding leaves of absence ("LOA"). As explained more fully below, all four Plaintiffs were terminated pursuant to the LOA provisions in the CBA: three were terminated because they failed to extend their LOAs in accordance with the CBA, and one was terminated because her LOA exceeded the 12-month CBA limit. The relevant provisions in the CBA, specifically Article V §§ 8 & 9 and Article XI §§ 1 & 2, provide, in pertinent part:

> ARTICLE V - SENIORITY
>
> . . .
>
> Section 8: Accommodations
>
> In the event that a long service employee develops serious and enduring physical limitations resulting from health or age considerations or should an employee experience a serious accident which results in physical limitations, which prevent an employee from performing the assigned job or operation, the parties hereto shall meet and discuss what, if any, special job assignment consideration such employee may need. The

parties may mutually agree to assign such employee to a future job vacancy without bidding the vacancy. The parties recognize that any transfer outlined above may limit the exercise of bidding rights by more senior employees, and, therefore, it is agreed that any transfers contemplated above will be considered only for exceptional and bonafide cases.

Section 9: Termination of Seniority

An employee's seniority shall terminate when he/she:

. . .

b) fails to return to work after a lay-off or expiration of a leave of absence,

c) is absent for three (3) consecutive days without notifying the Company . . . .

ARTICLE XI - LEAVES OF ABSENCE

Section 1: Time Limits

A leave of absence may be granted to an employee upon written request not to exceed thirty (30) days for illness or accident suffered by the employee or a serious illness or accident to a member of his immediate family. The Company may extend leaves of absences for additional thirty (30) day periods up to a maximum leave period of twelve (12) months. . . .

Section 2: Documentation

> All requests for leave must be in writing. In cases of sick leave, the Company may require proof of evidence of illness, including a doctor's certificate. In addition, the Company may require the employee to be examined by a doctor designated by the Company. . . .[1]

c. Factual Background of Plaintiffs

***Agustina Trevino*:** Trevino was injured on the job, went on LOA, and was terminated pursuant to the CBA when she failed to return to work after 12 months. She claims that art. XI § 1 of the CBA (12-month limit on LOAs) is unfair to injured employees and thus discriminates against them. She also claims that LS&CO. discriminated against her by not giving her light duty[2] or accommodating her under art. V § 8 of the CBA.

***Herminia Herrera*:** Herrera was injured on the job, went on LOA, and was terminated after she failed to provide a properly dated doctor's letter that specified the expected dates for her return. She claims that LS&CO. discriminated against

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[1] Plaintiff Guajardo was terminated in 1994, and her termination was governed by the CBA that ended January 27, 1995. The CBA provisions quoted in text above are the same in both CBAs, except that the agreement that expired on January 27, 1995, did not contain descriptive section headings.

[2] The light duty policy is an implied part of the CBA. *See Perugini v. Safeway Stores*, 935 F.2d 1083, 1088 (9th Cir. 1991) (claim based on refusal to provide "light duty" is preempted even though "[n]o provision of the CBA specifically addresses light duty").

her in the way it enforced and interpreted art. XI (LOA provision) of the CBA, and that LS&CO. should have accommodated her pursuant to art. V § 8 of the CBA.

***Beatriz Olivarez*:** Olivarez was injured on the job, went on LOA, and was terminated after she failed to renew her LOA. She claims that LS&CO. violated art. XI of the CBA when it failed to provide her with a full 30-day extension on her LOA.

***Gloria Guajardo*:** Guajardo was injured on the job, went on LOA, and failed to extend her LOA before it expired. When she failed to report to work within three working days of the expiration of her leave, she was terminated pursuant to the CBA. She claims that her termination violated art. XI § 1 of the CBA (requiring employees to renew their LOAs every 30 days) because the doctor's letter she submitted to renew her LOA should have put LS&CO. on notice that she would be unable to return to work at the end of the 30-day period. She also claims that LS&CO. violated its light duty policy and art. V § 8 of the CBA, which governs accommodations.

d. Brief Overview of Fifth Circuit Decision

The Fifth Circuit failed to discuss any of the facts set forth above surrounding Plaintiffs' discharges or the CBA provisions that underlie their workers' compensation discrimination claims. Rather, the court simply set out a bright line rule that workers' compensation discrimination claims, by their very nature, can never be preempted by § 301 of the LMRA.

> In order to recover under § 451.001, an employee must show that the employer's discriminatory action "would not have occurred when it did had the worker's compensation claim

> not been filed." This purely factual question centers on the employee's conduct and the employer's motivation. "Neither of [these] elements requires a court to interpret any term of a collective-bargaining agreement."
>
> To defend against a claim of retaliatory discharge, an employer must show that it had a non-retaliatory reason for the discharge. This question also does not "turn on the meaning of any provision of a collective-bargaining agreement."

Trevino, 197 F.3d at 780 (citations omitted).

The Fifth Circuit further held that workers' compensation discrimination claims cannot be removed to federal court because such claims "arise under" the Texas workers' compensation laws and are, therefore, barred from removal by § 1445(c). *Id.* at 781. Accordingly, the Fifth Circuit reversed the district court and ordered the claims remanded to state court.

Argument and Authority

I. The Fifth Circuit Erroneously Concluded That a Workers' Compensation Discrimination Claim "Arises Under" the State's Workers' Compensation Laws and Is Therefore Barred from Removal by § 1445(c).

A. Trevino Decides an Important Question of Federal Law That Should Be Settled by This Court.

Section 1445(c) prohibits the removal of state court actions "arising under" the state's workers' compensation laws. By concluding that a workers' compensation discrimination claim "arises under" a state's workers' compensation laws within the meaning of § 1445(c), *Trevino* effectively deprives a federal district court of removal jurisdiction over such claims. Because the Fifth Circuit was wrong in its conclusion, this issue should be settled by this Court.

First, the legislative history of § 1445(c) clearly establishes that, in enacting the statute, Congress was concerned with workers' compensation **benefit** claims, not discrimination claims:

> Nearly all of the State statutes on workmen's compensation provide summary proceedings for the expeditious and inexpensive settlement of claims by injured workmen against the employer.

S. Rep. No. 1830 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099, 3106. While workers' compensation statutes provide summary proceedings for "benefit claims," there is no summary proceeding for a workers' compensation discrimination claim, which must be filed in court and involves the same expenditure

of time and expense as any other lawsuit. The legislative history further demonstrates that in enacting § 1445(c), Congress was concerned with the large number of removed workers' compensation cases in four states: Texas, Alabama, New Mexico, and Louisiana. *Id.* at 3136. However, when § 1445(c) was passed in 1958, none of these states provided a cause of action for workers' compensation discrimination.[3]

Finally, § 451 is not part of the Texas Workers' Compensation Act ("TWCA"). The TWCA is codified as Subtitle A of Title 5 of the Texas Labor Code, which provides "this subtitle may be cited as the Texas Workers' Compensation Act." *Id.* § 401.001. Section 451 meanwhile is found in Subtitle B, which is entitled "Discrimination Issues."

B. Trevino Conflicts with the Decisions of Other Circuit Courts of Appeal.

The Fifth Circuit's holding in *Trevino* also conflicts with decisions of the Sixth and Seventh Circuits, which have expressly held that workers' compensation retaliation claims do not "arise under" the workers' compensation laws and therefore are not subject to the removal prohibition in § 1445(c).

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[3] *See* art. 8307c TEX. REV. CIV. STAT. ANN. (predecessor to § 451) (workers' compensation discrimination statute established in 1971); *Wiley v. Missouri Pac. R.R.*, 430 So. 2d 1016, 1021 (La. Ct. App. 1982, writ denied) (workers' compensation discrimination statute established in 1980); *Twilley v. Daubert Coated Prods.*, 536 So. 2d 1364, 1367 (Ala. 1988) (workers' compensation discrimination statute established after 1984); *Bottijliso v. Hutchison Fruit Co.*, 635 P.2d 992, 997-98 (N.M. App. 1981) (workers' compensation discrimination claim did not exist as of 1981).

In *Thornton v. Denny's, Inc.*, No. 92-1368, 1993 WL 137078 (6th Cir., Apr. 29, 1993)[4] (App. 8)[5], the plaintiff filed suit in state court alleging, among other things, that he had been terminated for pursuing his rights under the Michigan workers' compensation statute. After the case was removed to federal court, the plaintiff claimed that the federal court lacked subject matter jurisdiction to hear the case because it arose out of the Michigan workers' compensation law. Although the Michigan law contained language prohibiting discrimination against an employee because the employee had filed a workers' compensation claim, the Sixth Circuit held that the claim did not "arise under" the Michigan workers' compensation statute because the "workers' compensation statute provides neither the mechanisms nor the remedy for this type of suit." *Id.* at *2 (App. 8.4). Like its Michigan counterpart, the TWCA does not create either the mechanisms or the remedy for a workers' compensation discrimination claim in Texas; rather, such a claim is created by a statute outside of the workers' compensation statute. *See* Tex. Lab. Code § 451.

Similarly, in *Spearman v. Exxon Coal USA, Inc.*, 16 F.3d 722 (7th Cir. 1994), *cert. denied*, 513 U.S. 955 (1994), the plaintiff, who was discharged due to excessive absenteeism, filed suit in state court claiming that his discharge was in retaliation for pursuing his rights under the Illinois workers' compensation laws. After the case was removed to federal court, the plaintiff argued that removal was improper because his claim arose under the Illinois workers' compensation law

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[4] Pursuant to Local Rule 28(g) of the Sixth Circuit Court of Appeals, unpublished decisions may be cited if they have precedential value in relation to a material issue in a case.

[5] Unpublished decisions cited in this petition are included in the attached appendix.

and thus removal was prohibited by § 1445(c). The Seventh Circuit disagreed based on two grounds. First, § 1445(c) was designed to prevent removals that would nullify the expeditious and inexpensive procedures states had devised for workers' compensation claims. *Id.* at 724. The court reasoned that "[r]etaliatory-discharge litigation is anything but simple and expeditious; tort litigation in federal court is no more cumbersome than tort litigation in state court." *Id.* Second, in the court's view, "workers' compensation regimes entail limited compensation without fault, the antithesis of the motive-based [discharge] retaliatory tort in which unlimited compensatory and punitive damages are available." *Id.*

> Our view that the tort of retaliatory discharge is not a worker's compensation law is supported by the fact that, as a matter of federal law, worker's compensation laws provide limited no-fault compensation for an injury; this limit on damages is in exchange for the elimination of general tort rules and defenses. *See Larson, Workmen's Compensation* § 1.10 (desk ed. 1986). The Illinois tort of retaliatory discharge lacks, for purposes of § 1445(c), the essential elements of a worker's compensation law.

Spearman, 16 F.3d at 724 (quoting *Lingle v. Norge Div. of Magic Chef, Inc.*, 823 F.2d 1031, 1039 n.9 (7th Cir. 1987), *rev'd on other grounds*, 486 U.S. 399 (1988)).

The court went on to explain that while the workers' compensation law serves as the background of the workers' compensation retaliation tort, furnishing the "public policy" that the employer must respect, it is a completely different type of claim:

> That workers' compensation law is a premise of the tort does not mean that the tort "arises under" the workers' compensation laws, any more than a state tort based on the violation of a federal safety standard "arises under" that standard for purposes of the federal question jurisdiction . . . . A claim of retaliatory discharge may be adjudicated without any inquiry into the meaning of the workers' compensation laws; the question for decision usually is the employer's motive for adverse action rather than the entitlement to compensation for injury on the job.

Spearman, 16 F.3d at 725. Accordingly, the court found that the workers' compensation retaliation claim did not "arise under" the Illinois workers' compensation law and was therefore properly removed to federal court.[6] Significantly, in arriving at its decision, the Seventh Circuit specifically noted that its decision that the workers' compensation discrimination claim did not "arise under" the workers' compensation laws conflicts with the Fifth Circuit decision in *Jones v. Roadway Express, Inc.*, 931 F.2d 1086, 1091-92 (5th Cir. 1991), the very decision on which the Fifth Circuit relied in *Trevino*. *Spearman*, 16 F.3d at 723.

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[6] Although the workers' compensation discrimination claim claim in *Spearman* is a common law tort and the claim in *Trevino* is statutory, this is a difference without substance because the two causes of action have the same purpose of protecting employees who have been injured on the job and provide essentially the same remedies. Moreover, a workers' compensation discrimination claim under § 451 is treated as a tort under Texas law. *See Almazan v. United Servs. Auto. Ass'n, Inc.*, 840 S.W.2d 776, 780 (Tex. App.- San Antonio 1992, writ denied).

II. The Fifth Circuit Has Established an Impermissible Per Se Rule That Workers' Compensation Discrimination Claims Can Never Be Preempted by § 301.

A. Trevino Conflicts with Supreme Court Decisions.

Trevino, in effect, holds that a workers' compensation retaliation claim can never be preempted. This rule is in direct conflict with *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), one of a line of Supreme Court cases which has addressed the preemptive effect of § 301.

By way of background, almost fifty years ago, in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), the Court ruled that § 301 expresses a federal policy that the substantive law to apply in § 301 cases "is federal law, which the courts must fashion from the policy of our national labor laws." *Id.* at 456.

Five years later, the Court revisited § 301 in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962), and concluded that "in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Id.* at 104. The Court explained that the interpretation of CBAs must be determined by federal law because the possibility of conflicting substantive interpretations under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective bargaining agreements. *Id.* at 103-104. Accordingly, the Court held that a state court suit alleging a CBA violation must be brought under § 301 and must be resolved by reference to federal law.

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-11 (1985), the Court extended the preemptive effect of § 301

beyond suits alleging contract violations to suits involving the interpretation of a CBA.

> The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortuous breach of contract.

Id. at 211.

According to the Court, if state law were allowed to determine the meaning intended by the parties in adopting a particular phrase or term in a CBA, the parties would be uncertain as to what they were binding themselves to when they reached agreement in a CBA. *Id.* As a result, it would be more difficult to reach agreement, and disputes over the nature of the agreement would proliferate. *Id.* "Exclusion of such claims 'from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law.'" *Id.*

Finally, and most recently, the Court in *Lingle*, considered the preemptive effect of § 301 in the context of a workers' compensation discrimination claim. In that case, the plaintiff brought a state court action claiming that she had been discharged for exercising rights under the state workers' compensation act. The employer argued that the claim was preempted by § 301 because the applicable CBA protected employees "from discharge except for 'proper' or 'just' cause." *Lingle*, 486 U.S. at 401. This Court held that the claim was not preempted merely because the CBA provided "a broad contractual protection against discriminatory - or retaliatory - discharge" since the state court could resolve the claim "without interpreting the 'just cause' language of a collective bargaining agreement." *Id.* at 412-13. In arriving at its decision, however, this Court reaffirmed the broad and preclusive effect of § 301 preemption when a state law claim requires interpretation of a term in a CBA:

> [I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles – necessarily uniform throughout the Nation – must be employed to resolve the dispute.
>
> . . . .
>
> . . . Today's decision should make clear that interpretation of collective-bargaining agreements remains firmly in the arbitral realm; judges can determine questions of state law involving labor-management relations only if such questions

> do not require construing collective-bargaining agreements.

Id. at 405-06, 411 (footnotes omitted).

Although it did not find that the specific workers' compensation discrimination claim before it was preempted, *Lingle* expressly acknowledged that a workers' compensation discrimination claim, like any other state tort claim, is preempted if "resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement . . . ." *Id.* at 405-06.

In spite of the foregoing authorities on point, the Fifth Circuit has established a *per se* rule that workers' compensation discrimination claims can never be preempted. In so doing, the Fifth Circuit has ignored *Lingle's* holding that a workers' compensation discrimination claim, like any other state tort claim, may be preempted by § 301.[7]

B. Trevino Conflicts with Decisions of Other Federal Circuit Courts.

Trevino also conflicts with decisions from the First, Sixth, Eighth and Ninth Circuits which have held that claims of workers' compensation discrimination are preempted by § 301 when they allege a breach or require interpretation of a CBA.

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[7] Our case, unlike *Lingle*, does not involve a "just cause" provision under the CBA; rather, it involves specific provisions dealing with LOAs and accommodation.

1. First Circuit.

The First Circuit has found workers' compensation discrimination claims brought pursuant to Sections 75A and 75B of Massachusetts law preempted by § 301 on three separate occasions. Section 75A grants a hiring preference to any former employee who lost his job due to a compensable injury. Section 75B prohibits an employer from discharging or otherwise discriminating against an employee because he exercised his rights under the workers' compensation law. These provisions also incorporate federal preemption law by providing that "[i]n the event that any right set forth in this section is inconsistent with an applicable collective bargaining agreement, such agreement shall prevail."

In *Magerer v. John Sexton & Co.*, 912 F.2d 525 (1st Cir. 1990), the plaintiff claimed that he had been discharged in violation of Section 75B. While the plaintiff argued that this claim was wholly independent of the CBA, the First Circuit found the claim preempted because the CBA contained several provisions that could be construed to govern the conduct underlying the plaintiff's retaliatory discharge claim. In particular, the"management rights" clause gave the employer the right to determine the "direction of the work forces, including the disciplining, suspension or discharge of employees for proper cause." *Id.* at 530. Because the management rights clause provided standards to govern the underlying retaliatory discharge claim, the court would be required to consult the CBA to decide the claim. *Id.* Thus, the court held that the claim was completely preempted. *Id.*

Three years later, the First Circuit again found a workers' compensation discrimination claim preempted in *Smith v. WGBH Educ. Found., Inc.*, No. 93-1213, 1993 WL 375816

(1st Cir., Sept. 27, 1993).[8] (App. 7) According to the plaintiff, WGBH violated Sections 75A and 75B when it refused his request to return to work after being on a disability leave. The First Circuit concluded that the CBA essentially contained the same management rights clause as in *Magerer* and thus found Smith's Section 75B claim preempted. 1993 WL 375816 at *1 (App. 7.3). In terms of Smith's claims under Section 75A, the court found that the CBA gave WGBH "'the sole and exclusive right to make all decisions regarding the management, operation, and programming of [its] operations, including determination of the number of employees covered by this Agreement.'" *Id.* The CBA also contained a seniority-based hiring preference which conflicted with Section 75A. *Id.* Therefore, because plaintiff's claim required interpretation of the CBA, the court held it was preempted. *Id.* at *1 (App. 7.4).

More recently, in 1997, the First Circuit again found a workers' compensation discrimination claim preempted in *Martin v. Shaw's Supermarkets, Inc.*, 105 F.3d 40 (1st Cir.), *cert. denied*, 522 U.S. 818 (1997). In *Martin*, like *Smith*, the plaintiff, who had lost her job because of a compensable injury, brought suit in state court claiming that her employer violated Sections 75A and 75B by failing to rehire her. The court determined that because the management rights clause was arguably inconsistent with the statute, a court would have to construe the CBA to decide the claims. *Id.* at 44. Accordingly, the court found the claims preempted. *Id.*

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[8] While Rule 36(f) of the First Circuit Court of Appeals provides that unpublished opinions may not be cited in unrelated cases, the Eighth Circuit has found such rules unconstitutional under Article III of the U.S. Constitution because they purport to expand the judicial power beyond the bounds of article III. *Anastasoff v. U.S.A.*, 2000 U.S. App. Lexis 21179 at *3 (8th Cir. 2000).

2. Sixth Circuit.

In *Roberts v. Autoalliance Int'l, Inc.*, No. 92-1447, 1993 WL 210717 (6th Cir., June 15, 1993)[9] (App. 5), the plaintiff's complaint alleged three causes of action: workers' compensation discrimination, handicap discrimination in violation of state law and handicap discrimination in violation of federal law. With regard to the workers' compensation discrimination claim, the complaint contained a paragraph alleging that the employer's "policy of terminating all persons who remain off work greater than 52 weeks is intended to discriminate against persons who allege work-related injuries." 1993 WL 210717 at *2 (App. 5.4). The Sixth Circuit held that this provision made the plaintiff's claim dependent on the CBA because the district court would have to interpret the CBA to reach the plaintiff's claim. *Id.* at *5 (App. 5.12). Accordingly, the claim was preempted. *Id.*

In a novel twist, another plaintiff in the Sixth Circuit alleged that she had been terminated because her husband had filed a workers' compensation claim. *Beckwith v. Diesel Tech. Co.*, No. 99-1548, 2000 WL 761808 (6th Cir., May 30, 2000).[10] (App. 4) The plaintiff argued that under Michigan law, a discriminatory discharge of an employee in response to that employee's filing a workers' compensation claim was actionable in tort. *Id.* at *3 (App. 4.6). Therefore, the plaintiff argued that her own claim – as a spouse of the employee filing the workers' compensation claim – was a natural extension of Michigan law. *Id.* The Sixth Circuit held that a court hearing the plaintiff's case would be required to interpret the CBA

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[9] *See* footnote 4, *supra*.

[10] *See* footnote 4, *supra*.

because in her complaint, the plaintiff claimed that the employer's reason for terminating her – repeated absenteeism – was a pretext for firing her in response to her husband's workers' compensation claim. *Id.* at *3 (App. 4.7). Because it concluded that the employer would show that it fired the plaintiff because she failed to abide by the terms of the CBA, the court found her claim preempted. *Id.*

3. Eighth Circuit.

In *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238, 1246 n.11 (8th Cir. 1995), the court declined to adopt a rule that a claim which arises under a state's workers' compensation laws is *per se* nonremovable under § 1445(c). The court reasoned that as a matter of Congressional intent, § 1445(c) would not apply to a claim which is completely preempted by § 301 of the LMRA and only facially arises under a state's workers' compensation laws. Although the Eighth Circuit concluded that the specific workers' compensation discrimination claim in issue was not preempted by § 301, it recognized that workers' compensation discrimination claims may be preempted under appropriate circumstances. *Id.*

4. Ninth Circuit.

The Ninth Circuit has also found a workers' compensation discrimination claim partially preempted by § 301. In *Sanders v. Hughes Aircraft Co.*, No. 93-56378, 1994 WL 227971 (9th Cir., May 27, 1994) (App. 6),[11] the plaintiff claimed that

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[11] While Local Rule 36-3 of the Ninth Circuit Court of Appeals provides that unpublished opinions may not be cited in unrelated cases, the Eighth Circuit has found such rules unconstitutional under Article III of the

(continued...)

he was terminated in retaliation for filing a workers' compensation claim. In analyzing the preemption issue, the court noted that the plaintiff's complaint indicated that his retaliatory termination claim was in part based on alleged violations of the CBA. *Id.* at *2 (App. 6.4). The court held that to the extent the plaintiff's complaint indicated that his claim was partly based on alleged violations of the CBA, his claim was preempted by § 301. *Id.* at *2 (App. 6.4-6.5). *See also Monroe v. Missouri Pacific R.R.*, 115 F.3d 514 (7th Cir. 1997) (holding that RLA preempts claim in which plaintiff claimed that he was wrongfully discharged in violation of public policy because his employer attempted to prevent him from fully exercising his rights to collect damages for his work-related injuries).[12]

As demonstrated above, the First, Sixth, Eighth and Ninth Circuits have held that workers' compensation retaliation claims are preempted if adjudicating the claims would require interpretation of a CBA or if the plaintiffs claim that a provision contained in the CBA discriminates against

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[11] (...continued)
U.S. Constitution because they purport to expand the judicial power beyond the bounds of article III. *Anastasoff*, 2000 U.S. App. Lexis 21179 at *3.

[12] *Trevino* also conflicts with circuit court cases holding that state handicap discrimination claims are preempted by § 301. In *Davis v. Johnson Controls, Inc.*, 21 F.3d 866 (8th Cir.), *cert. denied*, 513 U.S. 964 (1994), the court held that the plaintiff's handicap discrimination claim was preempted because he would have to show that his employer could have reasonably accommodated his return-to-work request and the relocation of the plaintiff to a position commensurate with his physical limitations would require an examination of the seniority rights of both the plaintiff and other employees under the CBA. *Id.* at 868. That is the precise issue the court would have to address in resolving the claim of at least three out of four of the Plaintiffs in *Trevino*.

employees who have pursued workers' compensation claims. Accordingly, the Fifth Circuit's *per se* rule that workers' compensation retaliation claims under § 451 can never be preempted conflicts with these decisions and should be reviewed by the Court.

C. Trevino Decides an Important Question of Federal Law That Should Be Settled by This Court.

In *Lingle*, this Court determined that a state court action in which the plaintiff claimed that she had been terminated for exercising her rights under the workers' compensation act was not preempted by § 301 merely because the applicable CBA contained a general "just cause" provision. In *Trevino*, the Fifth Circuit determined that the Plaintiffs' claims that they were discriminatorily terminated because they pursued their rights under the workers' compensation laws were not preempted even though they involve the interpretation of detailed LOA provisions in the CBA. This Court has not considered whether the workers' compensation discrimination claim of an employee who was terminated in accordance with LOA provisions in a CBA is preempted by § 301.

The Fifth Circuit's ruling in this case has done exactly what the *Allis-Chalmers* Court warned against; it has elevated form over substance because a worker who is injured on the job and subsequently terminated under the terms of a CBA will always be able to evade the grievance and arbitration procedure of a CBA by labeling his claim as one for workers' compensation discrimination. The effect of the Fifth Circuit's ruling is to create a class of employees (i.e., workers with on-the-job injuries) who are immune from the well-established rule that they must arbitrate claims involving the CBA. The Fifth Circuit's decision will result in a patently unfair system

whereby a large class of employees can easily escape their obligations under the grievance and arbitration procedures of a CBA by merely relabeling their claims. This will not have an isolated impact on labor relations in the United States because the vast majority of CBAs in this country, like the one involved in this case, contain provisions governing LOAs and establish ramifications for employees who fail to comply with those provisions. As held in *Allis-Chalmers*, "[e]xclusion of such claims 'from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law.'" 471 U.S. at 211 (quoting *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962)).

Conclusion

For the foregoing reasons, LS&CO. respectfully requests that the Court grant its petition for writ of certiorari and hear this case.

Respectfully submitted,

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APPENDIX

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Agustina TREVINO, Herminia Herrera, Beatriz Olivarez and Gloria Guajardo, Plaintiffs-Appellants,

v.

Mike RAMOS; et al., Defendants,

Levi Strauss & Co., Defendant-Appellee.

No. 97-41493.

United States Court of Appeals,
Fifth Circuit.

Dec. 7, 1999.

Terminated employees brought state court action against employer alleging retaliatory discharge in violation of Texas Workers' Compensation Act and intentional infliction of emotional distress. Employer removed action to federal court. The United States District Court for the Southern District of Texas, Peter E. Ormsby, United States Magistrate Judge, denied employees' motion to remand and entered summary judgment in favor of employer. Employees appealed. The Court of Appeals, Robert M. Parker, Circuit Judge, held that: (1) resolution of retaliatory discharge claims did not require interpretation of collective-bargaining agreement (CBA), and claims thus were not pre-empted by Labor Management Relations Act (LMRA), and (2) remand of retaliatory discharge claims to state court was required by statute prohibiting removal of civil action in state court arising under state workers' compensation laws.

Reversed and remanded in part; vacated in part.

1. Labor Relations ⇨46

The intent of LMRA's pre-emptive reach is to fashion a uniform body of law regarding collective bargaining agreements and other labor contracts. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

2. Labor Relations ⇨758.1, 773.1

States ⇨18.46

If the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement (CBA), the application of state law is pre-empted and federal labor-law principles must be employed to resolve the dispute. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

3. Labor Relations ⇨45

States ⇨18.46

The LMRA pre-empts application of a state law only if such application requires the interpretation of a collective-bargaining agreement (CBA). Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

4. Master and Servant ⇨34.1

States ⇨18.49

Resolution of terminated employees' claims of retaliatory discharge under Texas Workers' Compensation Act did not require interpretation of collective-bargaining agreement (CBA), and claims thus were not pre-empted by LMRA, inasmuch employees' right to be free from retaliation would have existed even if there had been no CBA, and the primary issue was factual question of motivation, that is, whether employer terminated employees in retaliation for filing workers' compensation claims. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a); V.T.C.A., Labor Code § 451.001(1).

5. Master and Servant ⇨30(6.20)

To recover for retaliatory discharge or other discrimination under the Texas Workers' Compensation Act, an employee must show that the employer's discriminatory action would not have occurred when it did had the workers' compensation claim not been filed; this purely factual question centers on the employee's conduct and the employer's motivation. V.T.C.A., Labor Code § 451.001(1).

6. Master and Servant ⇨30(6.20)

To defend against a claim of retaliatory discharge under the Texas Workers' Compensation Act, an employer must show that it had a non-retaliatory reason for the discharge. V.T.C.A., Labor Code § 451.001(1).

7. Master and Servant ⇨34.1

States ⇨18.49

Even if a claim of retaliatory discharge under the Texas Workers' Compensation Act implicates a collective-bargaining agreement (CBA), that fact does not necessarily require pre-emption of the claim by the LMRA. Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a); V.T.C.A., Labor Code § 451.001(1).

8. Labor Relations ⇨758.1, 773.1

States ⇨18.46

LMRA pre-emption occurs when resolution of a state claim is inextricably intertwined with consideration of terms of a labor contract or when the application of a state law to a dispute requires interpretation of a collective-bargaining agreement (CBA). Labor Management Relations Act, 1947, § 301(a), 29 U.S.C.A. § 185(a).

9. Removal of Cases ⇨3, 101.1

Remand to state court of retaliatory discharge claims filed under Texas Workers' Compensation Act was required by statute prohibiting removal to federal district court of any civil action in state court arising under state workers' compensation laws. 28 U.S.C.A. § 1445(c); V.T.C.A., Labor Code § 451.001(1).

10. Removal of Cases ⇨3

Removal of any state workers' compensation claims is prohibited by statute providing that civil action in state court arising under state workers' compensation laws may not be removed to any federal district court. 28 U.S.C.A. § 1445(c).

Chris Anthony Brisack (argued), Neil Ernest Norquest, Norquest & Brisack, McAllen, TX, L. Aaron Pena, Jr., Aaron Pena & Associates, Edinburg, TX, for Plaintiffs-Appellants.

George P. Parker, Jr. (argued), Raquel G. Perez, Bracewell & Patterson, San Antonio, TX, for Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before EMILIO M. GARZA and PARKER, Circuit Judges, and COBB, District Judge.[1]

ROBERT M. PARKER, Circuit Judge:

Plaintiffs appeal the district court's denial of their motion to remand. Because plaintiffs' claim for retaliatory discharge is not pre-empted by federal law and because 28 U.S.C. § 1445(c) (1994) precludes removal of claims arising under the workers' compensation laws of any state, we find that the district court erred in denying plaintiffs' motion to remand. REVERSED.

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[1] District Judge of the Eastern District of Texas, sitting by designation.

I. FACTUAL HISTORY AND PROCEEDINGS BELOW.

Plaintiffs[2] complaint alleges that they were discharged for exercising their rights under the Texas Workers' Compensation Act. Defendant counters that plaintiffs were discharged in accordance with policies outlined in its Collective-Bargaining Agreement ("CBA") with plaintiffs' union. Plaintiffs' original complaint asserted claims for intentional infliction of emotional distress[3] and retaliatory discharge. The defendant removed the case to federal court. The district court denied plaintiffs' motion to remand because "[a]t the critical time of removal, plaintiffs' state court petition asserted at least one claim [intentional infliction of emotional distress] that was completely preempted by federal law and thus the entire case was properly removable."

Defendant subsequently filed motions for summary judgment based on the merits of plaintiffs' claims. The district court granted defendant's motions and dismissed plaintiffs' claims with prejudice because of a lack of evidence of a causal connection between plaintiffs' terminations and their assertion of workers' compensation rights.

Plaintiffs' appeal the judgment of the district court. Specifically, plaintiffs argue that the trial court erred in denying

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[2] All named plaintiff-appellants will be referred to collectively as plaintiffs.

[3] This claim is no longer a part of plaintiffs' complaint. After the case was removed to federal court, plaintiffs moved for leave to file amended pleading that eliminated the intentional infliction of emotional distress claim.

Plaintiff-Appellants' Motion to Remand, and in retaining jurisdiction over this case.

II. PRE-EMPTION.

A. *Section 301 of LMRA.*

Section 301 of the Labor Management Relations Act (LMRA) states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court in the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1994).

[1] The intent of LMRA's pre-emptive reach is to fashion a uniform body of law regarding collective bargaining agreements and other labor contracts. In *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103, 82 S. Ct. 571, 7 L.Ed.2d 593 (1962), the Supreme Court held that "the subject matter of § 301(a) is particularly one that calls for uniform law." The Court's discussion of the policy behind § 301's pre-emptive scope bears repeating:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of

> the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. . . .
>
> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to provide industrial peace.

Lucas Flour, 369 U.S. at 103-04, *quoted with approval in Lingle v. Norge Div. of Magic Chef,* 486 U.S. 399, 404 n.3, 108 S. Ct. 1877, 100 L.Ed.2d 410 (1988).

[2] The principle of § 301 pre-emption developed in *Lucas Flour* can be stated as follows: "[I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles–necessarily uniform throughout the Nation–must be employed to resolve the dispute." *Lingle,* 486 U.S. at 405-06.

B. Section 451.001 of the Texas Labor Code.

[3, 4] Pursuant to Texas statute, "A person may not discharge or in any other manner discriminate against an

employee because the employee has . . . filed a workers' compensation claim in good faith." TEX. LABOR CODE ANN. § 451.001(1) (West 1997). As noted above, § 301 pre-empts application of a state law "only if such application requires the interpretation of a collective-bargaining agreement." *Lingle,* 486 U.S. at 413. Thus, if the resolution of plaintiffs' claims of retaliatory discharge under § 451.001 does not require interpretation of the CBA, they are not pre-empted.

[5] In order to recover under § 451.001, an employee must show that the employer's discriminatory action "would not have occurred when it did had the worker's compensation claim not been filed." *Stevens v. National Educ. Centers, Inc.,* 990 S.W.2d 374, 380 (Tex. App.–Houston [14th Dist.] 1999, writ requested) (citing *Continental Coffee Prods. Co. v. Cazarez,* 937 S.W.2d 444, 450 (Tex. 1996)). This purely factual question centers on the employee's conduct and the employer's motivation. "Neither of [these] elements requires a court to interpret any term of a collective-bargaining agreement." *Lingle,* 486 U.S. at 407, 108 S. Ct. 1877.

[6] To defend against a claim of retaliatory discharge, an employer must show that it had a non-retaliatory reason for the discharge. This question also does not "turn on the meaning of any provision of a collective-bargaining agreement." *Id.*

> In a retaliatory discharge case, "[a]s the Supreme Court pointed out in *Lingle*, the court's task is complete . . . when it determines, as a factual matter, whether the employer's motivation for the discharge was the employee's filing of a worker's compensation claim or some other motive." If it determines that retaliation was not a motive, it does not need to

> determine whether other motives were legitimate or whether the CBA justified them.

Jones v. Roadway Express, Inc., 936 F.2d 789, 791-91 (5th Cir. 1991) (*"Roadway II"*); *see also Jones v. Roadway Express, Inc.*, 931 F.2d 1086, 1090 (5th Cir. 1991) (*"Roadway I"*) (citation omitted) ("[W]e do not require that the CBA be irrelevant to the dispute; either party may still use the CBA to support the credibility of its claims.").

[7, 8] Even if the plaintiffs' retaliatory discharge claim implicated the CBA, that fact would not necessarily require pre-emption of the claim. "[C]laims only tangentially involving provisions of collective-bargaining agreements are not preempted by section 301." *Thomas v. LTV Corp.*, 39 F.3d 611, 617 (5th Cir. 1994); *see also Livadas v. Bradshaw*, 512 U.S. 107, 123, 114 S. Ct. 2068, 129 L.Ed.2d 93 (1994) ("[W]hen the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished."). "A plaintiff's state law claims will not be preempted even when they are 'intertwined' with a CBA, so long as they are not 'inextricably intertwined' with it.". *Roadway I*, 931 F.2d at 1089. In other words, pre-emption occurs when resolution of a state claim is inextricably intertwined with consideration of terms of the labor contract or when the application of a state law to a dispute requires interpretation of the collective-bargaining agreement.

Defendants argue that a finding of pre-emption is mandated by our decision in *Reece v. Houston Lighting & Power Co.*, 79 F.3d 485 (1996). As noted by the district court, applying defendant's analysis requires the unjustified

conclusion that the *Reece* court overruled our holding in *Roadway I.*

> The present case involves the same type of retaliatory discharge workers' compensation claim brought under the same Texas statute, which has now been recodified as Texas Labor Code § 451. In contrast, the decision in *Reece* addressed whether the LMRA preempted a different provision of the Texas Labor Code prohibiting racial discrimination in employment. The *Reece* court did not cite *Roadway* and nothing in the opinion suggests that the court intended to modify, let alone overrule, the decision in *Roadway*. Unless and until the Fifth Circuit revisits its *Roadway* holding, that precedent is binding on this Court.

(Memorandum Order, June 5, 1997 at 2).

Interpretation of the CBA is not necessary for the resolution of this case. The primary issue in this case is the factual question of motivation: Did the defendant fire the plaintiffs in retaliation for filing worker's compensation claims? The answer to this question is not dependent on an interpretation of the CBA.

Plaintiffs have an independent right to file workers' compensation claims without fear of losing their jobs. As we previously stated:

> [T]he right to be free from retaliatory discharge for pursuing workers' compensation exists for Jones, as it did for the employee in Lingle, independently of the CBA. *The right originates in the statute which Texas*

> *has enacted to protect employees seeking compensation for work-related injuries. It does not depend on any right or duty originating in the CBA.* Jones' right would exist even if there were no CBA. The right that Jones claims accrues to employees "as individual workers, not as members of a collective organization."

Roadway I, 931 F.2d at 1090 (emphasis added) (citations omitted); *cf. Lingle,* 486 U.S. at 411 ("[T]here is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective bargaining agreements.").

Plaintiffs' retaliatory discharge claims do not require interpretation of the CBA for resolution, therefore, they are not pre-empted by § 301 of the LMRA.

III. REMAND OF THE RETALIATORY DISCHARGE CLAIM.

[9] Having established that plaintiffs' retaliatory discharge claim is not pre-empted, we now turn to the issue of whether the district court properly denied plaintiffs' motion to remand. Although the question confronting us is whether the case should be remanded to state court, rather than whether the defendant properly removed the case to federal court, the issue of removal controls our analysis. *See Roadway I,* 931 F.2d at 1091.

In an effort to control the ever-increasing flow of compensation cases into already strained federal dockets, Congress declared such actions non-removable.

> A civil action in any State court arising under the workmens' compensation laws of such State may not be removed to any district court of the United States.

28 U.S.C. 1445(c) (1994). This section "reflects a strong congressional policy that where the state court has been utilized by one of the parties in the state compensation machinery, the case should remain in the state court for its ultimate disposition." *Kay v. Home Indemnity Co.*, 337 F.2d 898, 902 (5th Cir. 1964). We remain convinced that workmen's compensation cases "have little real business in a federal court," and have therefore, been reluctant "to strain to find a way to entertain" such suits. *Id.* at 901.[4]

[10] In *Sherrod v. American Airlines, Inc.*, we held that "1445(c) prohibits the removal of any state worker's compensation claims." 132 F.3d 1112, 1118 (5th Cir. 1998). This bright-line rule is consistent with the wording of § 1445(c). *See Roadway I*, 931 F.2d at 1092 ("Because Congress intended that all cases arising under a state's workers' compensation scheme remain in state court, we believe that we should read section 1445(c) broadly to further that purpose."). In that vein, we find that the district court erred in denying plaintiffs' motion to remand their retaliatory discharge claim.[5]

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[4] We have already held that a claim filed under § 451.001 is one "arising under the workers' compensation law" for purposes of § 1445(c). *See Roadway I*, 931 F.2d at 1092.

[5] After reversing the district court's order denying the plaintiffs' motion to remand, the issue of whether the district court erred by granting defendant's motion for summary judgment regarding the merits of plaintiffs' claims becomes moot.

IV. CONCLUSION.

For the foregoing reasons, we REVERSE the district court's order denying plaintiffs' motion to remand and REMAND this case to the district court with instructions to remand to the state court. In addition, we VACATE the district court's ruling on the causal connection between plaintiffs' terminations and their workers' compensation claims.

App. 2.1

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-41493

AGUSTINA TREVINO, HERMINIA HERRERA,
BEATRIZ OLIVAREZ, GLORIA GUAJARDO,

Plaintiffs-Appellants

v.

MIKE RAMOS, ET AL

Defendants

LEVI STRAUSS & CO.

Defendant - Appellee

Appeal from the United States District Court for the
Southern District of Texas, McAllen

FILED
JUN 26, 2000
CHARLES R. FULBRUGE III, CLERK

ON PETITION FOR REHEARING EN BANC

(Opinion 12/7/99, 5 Cir., _____, _____, F.3d _____)

Before EMILIO M. GARZA and PARKER, Circuit Judges, and COBB,* District Judge.

PER CURIAM:

(✔) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

REHG-6a

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

Relevant Statutory Provisions

28 U.S.C. § 1445(c)

> A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

Labor Management Relations Act, 29 U.S.C. § 185(a).

Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the Untied States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Texas Labor Code § 451.001:

Discrimination Against Employees Prohibited

A person may not discharge or in any other manner discriminate against an employee because the employee has:

(1) filed a workers' compensation claim in good faith;

(2) hired a lawyer to represent the employee in a claim;

(3) instituted or caused to be instituted in good faith a proceeding under Subtitle A; or

(4) testified or is about to testify in a proceeding under Subtitle A.

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

William BECKWITH; Karen Beckwith,
Plaintiffs-Appellants,
v.
DIESEL TECHNOLOGY CO., Defendant-Appellee.

No. 99-1548.

May 30, 2000.

On Appeal from the United States District Court for the Western District of Michigan.

Before ENGEL, JONES, and COLE, Circuit Judges.

OPINION

COLE, Circuit Judge.

**1 Plaintiffs-Appellants Karen and William Beckwith appeal the district court's grant of summary judgment to Defendant-Appellee Diesel Technology Co. ("DTC"). On appeal, the Beckwiths argue that the district court erred in two respects: first, by concluding that Karen's wrongful discharge claim was preempted by § 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185; and second,

by concluding that both William's and Karen's claims of intentional infliction of emotional distress (IIED) were based on acts insufficiently extreme and outrageous to exempt them from preemption under § 301 of the LMRA. For the following reasons, we AFFIRM the order of the district court.

I. BACKGROUND

Both Karen and William began working for DTC in 1994. Both were members of the United Auto Workers, Local 167 ("UAW"), the exclusive bargaining representative for all DTC's production and maintenance employees. Their employment was governed by a collective bargaining agreement ("CBA") between DTC and UAW.

In August 1995, William was injured on the job. He took disability leave from November 1995 until July 1996, and returned to work on light duty. He took another disability leave from May 1997 until June 1998, and again returned to work on light duty. William was still working for DTC in a light duty position at the time of this suit. William filed a worker's compensation claim pursuant to the Michigan Worker's Disability Compensation Act, Mich. Comp. Laws Ann. § 418.101 et seq., which DTC disputed.

Karen was terminated on November 6, 1996 for violating DTC's attendance policy. She had been absent from work two days earlier in order to accompany her husband to a scheduled, non-emergency medical appointment. The UAW grieved the discharge pursuant to the CBA, and the issue went to arbitration on November 24, 1997. At arbitration, the UAW argued that Karen should have been permitted to cover her absence of November 4, 1996 with an "after the fact" vacation day. The union did not dispute that Karen had a poor

attendance record and that DTC had previously used progressive discipline to deal with Karen's absenteeism, but rather argued that the company's history of leniency in dealing with employee absences had led Karen to believe that she would not jeopardize her job by missing work without requesting leave in advance. In a written decision issued on February 23, 1998, the arbitrator found "no basis for [Karen] to reasonably expect that an after the fact vacation day would be approved," and concluded that management had just cause to dismiss Karen.

In January 1999, William and Karen filed a two-count complaint against DTC in the Kent County Circuit Court in Michigan. In count one, the plaintiffs charged that Karen was wrongfully discharged by DTC, and that the company's reliance on Karen's attendance record was a pretext for its effort to retaliate against William for his worker's compensation claims. In count two, the Beckwiths charged that, from the time of William's injury in August 1995, DTC harassed and intimidated both of them in order "to inflict sufficient emotional distress or discomfort that either or both Plaintiffs would voluntarily terminate there [sic] employment," and that they had suffered physical and emotional discomfort as a direct and proximate result of DTC's harassment.

**2 Shortly after the district court granted DTC's motion to remove the case to federal court, DTC moved for summary judgment. After conducting a hearing on the motion on April 16, 1999, the court granted DTC's motion for summary judgment. In an oral ruling, the court found that Karen's claim of retaliatory discharge was preempted by § 301 of the LMRA[1]

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[1] Section 301 provides that:

(continued...)

because its resolution would require the court to interpret the CBA; the court then dismissed the claim because it was filed well after the six-month statute of limitations. *See Del Costello v. International Bhd. of Teamsters*, 462 U.S. 151, 169 (1983). The court also found that the IIED claims were preempted, and that there was no genuine issue of material fact regarding whether DTC's conduct had been outrageous or extreme, because it clearly was not.

The court issued a written summary order of dismissal, and the Beckwiths filed a timely notice of appeal.

II. STANDARD OF REVIEW

We review the district court's grant of summary judgment de novo. *See Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). In deciding a motion for summary judgment, the district court must view the factual evidence in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The non-moving party may not rest on its pleadings, but rather must

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[1] (...continued)

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. 29 U.S.C. § 185(a). "Since 1962, the Supreme Court has held that section 301 preempts state law rules that substantially implicate the meaning of collective bargaining agreement terms." *DeCoe v. General Motors Corp.*, 32 F.3d 212, 216 (6th Cir .1994). This court's interpretation of § 301 is discussed, infra.

put forward evidence from which a rational trier of fact could find in its favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

III. WRONGFUL DISCHARGE

On appeal, Karen argues that the district court erred by finding that her wrongful discharge claim was preempted by § 301 of the LMRA.[2] In general, if a state law claim brought by a union member plaintiff requires interpretation of the governing CBA, § 301 demands preemption. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987). In *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), the Supreme Court stated the governing principle for § 301 preemption cases:

> if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is preempted and federal labor-law principles--necessarily uniform throughout the Nation--must be employed to resolve the dispute.

Id. at 405-06. This circuit detailed its two-step approach to deciding whether § 301 preemption applies in *DeCoe v. General Motors Corp.*, 32 F.3d 212, 216 (6th Cir. 1994):

> First, the district court must examine whether proof of the state law claim requires interpretation of collective bargaining agreement terms. Second, the court must ascertain whether the right claimed by the plaintiff is created by the collective

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[2] The Beckwiths concede that, if the district court was correct in ruling that § 301 preempts Karen's claim, the claim is time-barred.

bargaining agreement or by state law. If the right is borne of state law and does not invoke contract interpretation, then there is no preemption. However, if neither or only one criterion is satisfied, section 301 preemption is warranted.
**3 *Id.* (citations omitted).

Karen admits that the district court was correct to apply the two-part test enunciated in DeCoe and concedes that she was terminated under the "apparent authority" of the CBA on the basis of excessive tardiness. She claims, however, that the true question before the court is whether DTC fired her in response to her husband's worker's compensation claim, and that resolution of that question does not require interpretation of the CBA.

Karen's claim fails under the first prong of the DeCoe test because proof of the retaliatory discharge claim "requires interpretation of collective bargaining agreement terms." DeCoe, 32 F.3d at 216. In applying the first prong, we "look[ ] to the essence of the plaintiff's claim, in order to determine whether the plaintiff is attempting to disguise what is essentially a contract claim as a tort." *Id.* Only if the plaintiff can prove all the elements of her claim without requiring the court to examine the CBA does her claim escape preemption. *Id.* Karen describes her claim on appeal as follows. She argues that under Michigan law, the retaliatory discharge of an employee in response to that employee filing a worker's compensation claim is actionable in tort; Karen then argues that her own claim--as the spouse of the employee filing the worker's compensation claim--is a natural extension of Michigan law. Karen further claims that the retaliation in this case came in the form of a hostile work environment that was intended to force her to quit; since the CBA did not provide for a stress-free or non-hostile work environment, Karen argues

that the court could resolve her claim without construing the CBA.

It is unlikely that Karen can even state a claim under Michigan law: she acknowledges that the Michigan law authorizing tort relief for workers who are fired in response to filing worker's compensation claims, *see* M.C.L.A. § 418.301(11), has not yet been extended to the worker's family members. More important, the court hearing Karen's case will have to interpret the CBA. In the complaint, Karen claimed that DTC's reason for terminating her--repeated absenteeism--was a pretext for firing her in response to her husband's worker's compensation claim. At trial, DTC's defense would surely be that it fired Karen because she failed to abide by the terms of the CBA, and that it disciplined and then terminated her pursuant to the CBA. A court will have to interpret the CBA, which requires that "[a]ll vacation time off must be pre-approved," and which permits DTC to discipline employees, to see if that defense is valid. Because resolution of Karen's retaliatory discharge claim would "require [ ] interpretation of collective bargaining agreement terms," DeCoe, 32 F.3d at 216; *see also Lingle*, 486 U.S. at 405-06, Karen's claim is preempted.[3]

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[3] The Beckwiths point to *Lingle*, 486 U.S. 399 (holding that employee's state law claim of retaliatory discharge was not preempted by § 301 because it did not require interpretation of pertinent CBA), and this court's decision in *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1331 (6th Cir. 1989) (en banc) (holding that employee's Michigan law claim of retaliatory discharge for filing a worker's compensation claim did not implicate CBA) to support their argument that Karen's retaliation charge is not preempted. As the district court found, the facts of this case do not present simply an employer's discharge of a worker because that worker filed or could potentially file for worker's compensation benefits. *See Lingle*, 486 U.S. at 401; *Smolarek*, 879 F.2d at 1328-29. Rather, Karen admits that DTC's stated reason for terminating her was her "excessive

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In addition, Karen has put forth virtually no evidence beyond her complaint that her discharge was wrongful. Because resolution of Karen's wrongful termination claim would require recourse to the CBA, and because she has offered virtually no evidence of her wrongful discharge, the district court's grant of summary judgment on Karen's claim of wrongful termination was proper.

IV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (IIED)

**4 The Beckwiths next argue that the district court erred by granting summary judgment to DTC on their IIED claims. The Beckwiths essentially argue that DTC harassed them in retaliation for William filing a worker's compensation claim, and that since nothing in the CBA protects them from this type of harassment, interpretation of the CBA is unnecessary to resolution of their claims. Thus, the Beckwiths argue, their claims are not preempted. DTC responds that both Karen and William will have to resort to the CBA to prove their IIED claims, and that even if the Beckwiths' IIED claims are not preempted, they have failed to allege conduct sufficiently extreme and outrageous to state a claim under Michigan law.

This court's inquiry is again guided by the two-pronged question posed in DeCoe: whether the plaintiffs' state law claim requires interpretation of the CBA, and whether the right claimed derives from the CBA or state law. *See DeCoe*,

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[3] (...continued)
tardiness." Appellants' Br. at 18. Resolution of her case would require the court to interpret the CBA to evaluate whether DTC terminated Karen in accordance with its rights under the CBA. *See Lingle*, 486 U.S. at 413; *DeCoe*, 32 F.3d at 216. As such, Karen's claim is preempted.

32 F.3d at 216. Although the Michigan Supreme Court has yet to recognize the tort of IIED, *see Andrews v. Prudential Securities, Inc.*, 160 F.3d 304, 309 (6th Cir. 1998) (citing *Roberts v. Auto-Owners Ins. Co.*, 374 N.W.2d 905, 906 (Mich.1985)), this court has assumed that the Michigan Supreme Court would recognize such a tort under appropriate circumstances, and that it would analyze the tort using the definition found in the Restatement (2d) of Torts. *See id.*; *DeCoe*, 32 F.3d at 218. To establish a prime facie case of IIED, a plaintiff must establish the following four elements: 1) extreme and outrageous conduct; 2) intent or recklessness; 3) causation; and 4) severe emotional distress. *See Andrews*, 160 F.3d at 309. The defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (citations and quotations omitted). The defendant will be liable only "where the distress inflicted is so severe that no reasonable man could be expected to endure it." *Id.* (citation and quotation omitted).

Neither of the Beckwiths state an IIED claim under Michigan state law. As the district court found, the conduct that the Beckwiths allege does not even approach the level of outrageousness required to satisfy the first element of an IIED claim. *See Hartleip v. McNeilab, Inc.*, 83 F.3d 767, 777 (6th Cir.1996) (finding plaintiff's allegations of sexual harassment insufficient to establish outrageousness under Michigan law); *Rush v. United Technologies*, 930 F.2d 453, 456-57 (6th Cir. 1991) (finding that terminated employee failed to allege facts sufficient to state IIED claim under Michigan law); *Polk v. Yellow Freight Sys., Inc.*, 801 F.2d 190, 196-97 (6th Cir. 1986) (discharged employee who failed to obey instruction of employer failed to state IIED claim). By failing

to allege acts of sufficient outrageousness, the Beckwiths' claims fail, preempted or not. *See Adkins v. General Motors Corp.*, 946 F.2d 1201, 1213 (6th Cir. 1991) (finding state interest in adjudicating plaintiffs' emotional distress claims too insubstantial to defeat complete preemption where plaintiffs failed to make specific allegations of outrageous conduct on part of union or employer); *Slone v. Martin Marietta Energy Sys.*, No. 95-4182, 1997 WL 139794 (6th Cir. Mar. 26, 1997) (upholding grant of summary judgment to defendant in federal labor action where plaintiff failed to allege facts outrageous enough to state a claim of IIED under state law); *see also DeCoe*, 32 F.3d at 219-20 (section 301 preempts Michigan IIED claim where court must refer to CBA to determine if defendant acted outrageously).

V. CONCLUSION

**5 For the reasons discussed above, we AFFIRM the judgment of the district court.

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the publication and citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

Donna ROBERTS, Plaintiff-Appellant,
v.
AUTOALLIANCE INTERNATIONAL, INC.,
Defendant-Appellee.

No. 92-1447.

June 15, 1993.

On Appeal from the United States District Court for the Eastern District of Michigan, No. 90-73398, Hackett, J.

E.D.Mich.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Before BOGGS and BATCHELDER, Circuit Judges, and MANOS, Senior District Judge.[1]

PER CURIAM.

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[1] The Honorable John M. Manos, United States District Judge for the Northern District of Ohio, sitting by designation.

**1 Roberts appeals the district court's denial of her motions to amend her complaint and the summary disposition of her complaint. We find that the district court abused its discretion in refusing to permit Roberts to delete a paragraph from her complaint. Our ruling follows from our finding that the district court erroneously held that count I of Roberts's complaint would have been preempted by Labor Management Relations Act § 301 even if Roberts's proposed changes had been permitted.

I

A. Facts

Donna Roberts joined Defendant Mazda Motor Manufacturing[2] as an assembly line worker on February 29, 1988. After a short training program, she entered the Trim and Final Department and performed repetitive hand, wrist, and arm motions for over forty hours per week. In June 1988, she complained of hand and wrist pain, and one of Mazda's doctors restricted her to doing light tasks.

Roberts's supervisor allegedly refused to honor the medical restrictions and insisted that she perform her line job. After a second visit to Mazda's doctors, Roberts was given similar orders restricting her work and, upon Roberts's return, her supervisor allegedly made her wash floors because he said that was the only work he had available for her. Mazda then gave Roberts a different assembly line job, but after she found that she could not do this job either, she was placed on medical leave. In August 1988, Roberts was called back to work and given a temporary job answering phones while the

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[2] Mazda Motor Manufacturing has been renamed AutoAlliance International, Inc. Because Roberts was employed by Mazda, we refer to the defendant as Mazda instead of AutoAlliance.

computerized phone system was being repaired, but when that job ended, Mazda told Roberts they had no work for her to do. Roberts was returned to medical leave and began participating in Mazda's salary continuation program.

In September 1988, Roberts filed for workers' compensation alleging that she suffered from bilateral carpal tunnel syndrome as a result of her work. Mazda disputed the claim, arguing that Roberts's injury was not work-related. She was found disabled for a closed period and she appealed that decision.

In August 1989, after receiving 52 weeks of partial pay under the salary continuation program, Roberts's seniority was terminated in accordance with the collective bargaining agreement ("CBA") because she was unable to return to work. Her termination letter reminded her that she could apply for long term disability benefits, which she did, and benefits were approved. She also complained to her union about the termination of her seniority and the union filed a grievance with Mazda.

In September 1990, the union and Mazda met to discuss several labor relations issues, including the policy of terminating workers' seniority upon expiration of the 52 weeks of partial salary. Mazda agreed to restore seniority to the workers who were discharged under this plan and Roberts's employment status was returned to "inactive," which was her status in August of 1989.[3] Roberts's "inactive" employment status was guaranteed through the expiration of the CBA on March 3,1991.

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[3] Roberts was reinstated despite the fact that she did not precisely fit the terms of the union-Mazda deal.

**2 In October 1990, Roberts filed a three-count complaint in the Wayne County Circuit Court.

In November 1991, during the pendency of this case, Roberts's long-term disability benefits were terminated (as was appropriate under the Employee Benefit Plan) and her seniority was terminated pursuant to the provisions of the CBA.[4]

B. Procedural Facts and History

In October 1990, Roberts filed a three-count complaint in the Wayne County Circuit Court. Count I, entitled "Worker's Compensation Discrimination-- MCLA 418.301(11)," incorporated by reference certain general allegations and then alleged:

25. Defendants' [sic] terminated Plaintiff [sic] employment as a result of her assertion of a work-related medical condition.
26. In the alternative, Defendant Mazda's policy of terminating all persons who remain off work greater than 52 weeks is intended to discriminate against persons who allege work-related injuries.
27. In the alternative, Defendants discriminated against Plaintiff by failing or refusing to offer her work within her restrictions, whereas other persons without a work-related condition were accommodated at the plant.

Count II ("Handicap Discrimination") alleged that Mazda discriminated against Roberts because of her physical handicap

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[4] The union and Mazda had entered into a new three-year CBA before the expiration of the old CBA, and this had the effect of extending Roberts's "inactive" status until this termination occurred in November 1991.

in violation of the Michigan Handicappers' Civil Rights Act. Count III ("Handicap Discrimination--Federal Rehabilitation Act of 1973") alleged that Mazda's refusal to accommodate Roberts's handicap violated federal law.

In November 1990, Defendant Mazda removed Roberts's suit to federal court based on federal question jurisdiction. In December 1990, Roberts moved to have the case remanded to state court arguing only that the federal court had no jurisdiction over the workers' compensation discrimination claim (count I). This motion was denied on February 21, 1991. On March 4, 1991, Roberts moved to dismiss voluntarily counts II and III of her complaint. On March 21, Mazda filed a motion to dismiss or for summary judgment, contending, among other things, that count I was preempted by the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (LMRA § 301).

On July 11, the court ruled on both parties' March 1991 motions. It wrote:

Count I plainly invites the court to interpret the CBA by finding that Mazda's practice of terminating workers who are absent for 52 consecutive weeks--a policy that is set out in the CBA at Article VIII, § 5.1--discriminates against persons with work-related injuries. Plaintiff reinforced this stance when she testified in deposition that she presumed her termination related to a contract interpretation dispute between Mazda and her union. While plaintiff opposes defendants' motion with arguments that she was a victim of discrimination by her supervisor while she worked in the Mazda plant, there is no escaping that plaintiff has challenged the discriminatory policies of the CBA on the face of her complaint. Although the court could analyze the allegations of discrimination by the

supervisor without resorting to the CBA, the court must interpret the CBA to reach the accusations of the complaint.

**3 (footnote omitted.) The district court then ruled that count I was preempted by LMRA § 301 because it required interpretation of the CBA and ordered Mazda to supplement its motion for dismissal or summary judgment with a brief on why count I failed to stated a claim under § 301. Finally, the court denied without prejudice Roberts's request for voluntary dismissal of counts II and III:

Because the court finds in this order and opinion that the doctrine of federal preemption prohibits the remand of count I to the Michigan Circuit Court, plaintiff may be prejudiced by the granting of her motion to dismiss counts II and III. The court, therefore, will deny that motion without prejudice.

On August 7, as part of her response to Mazda's brief on the issue of whether Roberts's complaint stated a claim under § 301, Roberts moved to delete[5] paragraph 26 from her complaint. On August 21, Roberts moved to amend her complaint by substituting the following language for paragraph 26: "Defendant discriminated against Plaintiff by harassing her, giving her job assignments in violation of her restrictions after reporting her work-related injuries." On November 25, 1991, Roberts moved to amend her complaint to add a claim based on Mazda's alleged failure to notify her

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[5] Roberts asked the court to "dismiss paragraph 26 of Count I." For clarity, we refer to this particular motion as the "motion to delete."

properly of her termination.[6] Mazda opposed each of these motions.

On March 26, 1992, the district court issued two decisions. In one of these, the district court denied the two motions to amend (filed August 21 and November 25). After setting out the applicable law, the court analyzed the first motion to amend in one paragraph:

In the present case, in her first motion to amend the complaint, plaintiff is seeking to substitute different language in paragraph 26 of the original complaint and effectively remove any reference to a termination policy in the collective bargaining agreement under which plaintiff worked. This request comes after the court has ruled that count I is preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. 185, and after plaintiff has filed motions to voluntarily dismiss counts II and III . . . and dismiss paragraph 26 completely. It appears to the court that plaintiff's first motion to amend is made with a dilatory motive to remove all vestiges of a federal question from the complaint. Additionally, at this late stage in the proceedings, allowing an amendment would cause undue delay as well as be prejudicial to defendant, because it would require further discovery and incur additional expense. These factors persuade the court that plaintiff's first motion to amend the complaint should be denied. . . .

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[6] Roberts claimed that the termination letter sent November 8, 1991 did not provide sufficient warning that her failure to return to work within five working days of the termination of her long-term disability benefits (on November 1, 1991) would result in her termination.

Roberts's second motion to amend was also denied. The district court reasoned that amendment would cause undue delay and "simply add another allegation subject to § 301 preemption which, under the facts of this case, [might] not survive a motion to dismiss.".

In its second opinion of March 26, the court granted Mazda's motion for summary judgment, holding that Roberts's facts could not sustain a § 301 claim. The district court denied without discussion Roberts's motion to delete paragraph 26 from her complaint.[7]

II

**4 We are asked to review the district court's decisions granting Mazda's motions for dismissal or summary judgment on counts I, II, and III and denying Roberts's motions to amend her complaint and to delete paragraph 26.[8] While we ultimately resolve this case on grounds that the district court abused its discretion in refusing to permit Roberts to modify her complaint, the interconnectedness of the preemption issue and Roberts's requests to modify her complaint requires that we first address the preemption issue.

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[7] Apparently, the court felt that either its discussion of the summary judgment granted on count I or its ruling on the two separate motions to amend was a sufficient basis to deny the motion to delete. We address this issue infra.

[8] We also review the district court's order of July 11 (which held that count I was preempted by LMRA § 301) despite the fact that it was not specifically mentioned in the notice of appeal. We do this because the July 11 order was an integral part of the district court's ultimate summary disposition of the case.

A. Preemption by § 301

Mazda's motion was a motion to dismiss, or, in the alternative, a motion for summary judgment. The district court treated the motion as one for summary judgment, so this court reviews the district court judgment de novo. *Adkins v. United Mine Workers*, 941 F.2d 392, 399 (6th Cir.1991), cert. denied, 112 S. Ct. 1180 (1992).

The district court relied primarily on the face of Roberts's complaint, emphasizing particularly paragraph 26, in granting Mazda's motion for summary judgment. However, one additional fact was used by the district court to support its finding of preemption:[9] the deposition testimony of Roberts in which, according to Mazda, she "admits" that her claim is governed by the CBA. We first dispose of this argument.

Summarizing Roberts's testimony and giving to Mazda the benefit of the doubt as to its meaning, we find that Roberts testified that she understood that (1) her employment was governed by the CBA, and (2) Roberts's union grieved her discharge on grounds that the CBA should not be interpreted in the way in which Mazda was interpreting it. Mazda then argued in the district court and before us that preemption was mandated because Roberts "admitted" that her employment was governed by the CBA and that her termination turned on the meaning of the CBA. The district court apparently agreed with this argument,[10] but we do not. What Roberts understood to be

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[9] The district court's mention of this fact is found in the July 1991 ruling which was essentially the first of two parts in the summary judgment ruling.

[10] We note, however, that this point was not the primary basis of

(continued...)

the union's basis for grieving her termination has little, if anything, to do with whether the claim of discrimination she raises in this lawsuit is governed by the CBA. What matters is whether her legal theory of this case requires interpretation of the CBA. Her statements at the deposition cannot be stretched as far as Mazda would like them to go.[11]

We turn now to the preemption issue. Without engaging in an extended discussion of the cases developing the doctrine of § 301 preemption,[12] we identify the issue in this case as whether Roberts's suit is sufficiently "independent" of the CBA to withstand the preemptive force of § 301. The controlling precedents on this issue are *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) and *Smolarek v. Chrysler Corp.*, 879 F.2d 1326 (6th Cir.) (en banc), cert. denied, 493 U.S. 992 (1989).

In *Lingle*, the plaintiff was injured, allegedly at work, and filed a workers' compensation claim. Her employer did not believe that she was injured at work and fired Lingle for filing a false workers' compensation claim. The union grieved the discharge, objecting that Lingle was not fired for "just" or "proper" cause

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[10] (...continued)
the district court's ruling.

[11] We also note that matters which can be "admitted" by a party are generally limited to matters of fact and some mixed questions of fact and law. *See* 8 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2255 (1970). It cannot seriously be contended that a party's understanding of a legal matter could constitute a binding admission. It is for the court in all instances to decide what law applies to a particular case.

[12] For a discussion of the history and development of § 301 preemption, *see International Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 855-859 (1987).

as the CBA required. At the same time, Lingle filed an action in state court alleging she had been discharged for exercising her rights under the state workers' compensation laws. Both the district court and the Seventh Circuit (en banc) held that Lingle's claim was preempted.

**5 The Supreme Court reversed. After reviewing its prior § 301 preemption decisions, the Court wrote:

"[To] show retaliatory discharge, the plaintiff must set forth sufficient facts from which it can be inferred that (1) he was discharged or threatened with discharge and (2) the employer's motive in discharging or threatening to discharge him was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights." [citations to state case law omitted] Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason for the discharge; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement. Thus, the state-law remedy in this case is "independent" of the collective-bargaining agreement in the sense of "independent" that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement.

Lingle, 486 U.S. at 407 (emphasis added) (citations omitted). The Court rejected the Seventh Circuit's view that the claim was preempted because analyzing the discharge under the CBA or under state tort law involved deciding the same factual issues.

In a post-*Lingle* decision, this Court, sitting en banc, held that a workers' compensation discrimination/retaliatory discharge claim was not preempted by § 301. *Smolarek*, 879 F.2d at 1331. This Court cited *Lingle* throughout its decision and concluded that the claim was "sufficiently set out as separate and apart from a collective bargaining contract claim, and thus avoid[ed] preemption." 879 F.2d at 1331; cf. *Dougherty v. Parsec, Inc.*, 872 F.2d 766 (6th Cir. 1989) (tortious interference with contract/business relationship claim not preempted by § 301 because there was no need to interpret the contract (the CBA) in order to find that another had tortiously interfered with it).

In light of *Lingle*, and given the way Roberts drafted her complaint, the question before the district court in the instant case was easy. Paragraph 26 alleges that the provisions of the CBA are discriminatory. This allegation makes Roberts's claim dependent on the CBA because the district court would have to interpret the CBA to reach plaintiff's claim. And, "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law . . . is pre-empted and federal labor-law principles--necessarily uniform throughout the Nation--must be employed to resolve the dispute." *Lingle*, 486 U.S. at 405-06 (footnotes omitted).

However, if we assume for purposes of analysis that paragraph 26 had been deleted from the complaint, an entirely different outcome results. Paragraph 25 ("Defendants' [sic] terminated Plaintiff [sic] employment as a result of her assertion of a work-related medical condition") is not preempted, because, in order to adjudicate this claim, the court need only look to the facts of the situation and need not interpret the CBA. *See Lingle*, 486 U.S. at 407 (common law tort claim for retaliatory discharge not preempted); *Smolarek*,

879 F.2d at 1331 (workers' compensation discrimination/retaliatory discharge claim under Michigan statute not preempted); cf. *Baldracchi v. Pratt & Whitney Aircraft Div., United Technologies Corp.*, 814 F.2d 102 (2d Cir. 1987) (allegation that defendant violated Connecticut statute by terminating plaintiff for filing a workers' compensation claim held not preempted), cert. denied, 486 U.S. 1054 (1988).

**6 Paragraph 27 alleges that "Defendants discriminated against Plaintiff by failing or refusing to offer her work within her restrictions, whereas other persons without a work-related condition were accommodated at the plant." Roberts's legal theory here is one of discrimination, and paragraph 27 would require the court to consider only factual issues--how Mazda treated employees who asserted work-related injuries compared to how it treated those with non- work-related injuries. It would not require interpretation of the CBA and thus would not be preempted. Since neither paragraph 25 nor 27 requires preemption, count I would not be preempted in the absence of paragraph 26.

Therefore, whether Roberts's claim is preempted depends entirely upon whether paragraph 26 is present in or absent from the complaint. We turn now to consideration of the district court's refusal to permit Roberts to delete paragraph 26 or amend her complaint.

B. Legal Standards for Permitting Amendment of Pleadings

The question of whether a party should be allowed to amend a pleading is left to the discretion of the district court and the district court may only be reversed if it abused its discretion.

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330-31 (1971); *United States v. Wood*, 877 F.2d 453, 456 (6th Cir.1989).

Federal Rule of Civil Procedure 15(a) provides that leave to amend a pleading should be "freely given when justice so requires."
If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given."

Forman v. Davis, 371 U.S. 178, 182 (1962). "'[D]elay alone, regardless of its length is not enough to bar [amendment] if the other party is not prejudiced.'" *Moore v. City of Paducah*, 790 F.2d 557, 560 (6th Cir.1986) (quoting 3 James W. Moore, Federal Practice ¶ 15.08 at 15.76). And, if the court can impose conditions upon leave to amend in order to mitigate the prejudice to the non-moving party, it could be an abuse of discretion to deny the motion outright. *See* 6 Charles A. Wright, et al., Federal Practice and Procedure § 1486 at 605-06 (1990) ("If the party opposing amendment can be protected by the use of conditions from any possible prejudice that might result from the untimeliness of the amendment, there is no justifiable reason for not allowing it").

C. Analysis of the District Court's Rationale

1. Motion to delete

We first address Roberts's motion to delete paragraph 26.[13] Although the district court did not discuss why it denied Roberts's motion to delete, several reasons for the denial can be gleaned from the district court's decisions: undue delay, prejudice to Mazda, dilatory motive, and futility of amendment.

**7 For the reasons stated in our discussion of the preemption issue above, we find that the district court's belief that deleting paragraph 26 would be futile was erroneous. The district court's remaining reasons were contained in its rulings on the later motions to amend, and we consider those reasons as they would apply to the motion to delete.

The primary reason for denying the August 21 motion to amend was that the court found Roberts had "a dilatory motive to remove all vestiges of a federal question from the complaint." Secondary reasons were undue delay and prejudice to Mazda "because [permitting amendment] would require further discovery and incur additional expense."

We hold that none of these reasons suffices to justify the denial of the motion to delete. First, while Roberts unquestionably wanted to be in state court rather than federal court, the mere fact that she attempted to clarify her state law claim by moving

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[13] We note that Roberts's approach here should be discouraged: burying in a response brief a motion to dismiss a paragraph from one's complaint is hardly a commendable practice. The motion not only might be missed completely, but also fails to give the district court a focused legal and factual basis upon which to consider it.

to delete paragraph 26 after she became aware of the preemption problem is not cause to find that she acted improperly.[14] At oral argument, counsel for Mazda cited *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), for the proposition that courts should guard against plaintiffs' deleting federal claims so they can get back into state court. Cohill does not so hold; on the contrary, Cohill held that "a district court has discretion to remand to state court a removed case involving pendent claims upon a proper determination that retaining jurisdiction over the case would be inappropriate." Cohill, 484 U.S. at 357. While acknowledging that forum manipulation concerns were legitimate, the Court specifically rejected Carnegie-Mellon's argument that "giving district courts discretion to remand cases involving pendent state-law claims [would] allow plaintiffs to secure a state forum through the use of manipulative tactics." *Id.* The Court stated that an attempt to manipulate the forum was simply one factor to be considered in the district court's decision whether to retain or remand a pendent state-law claim after dismissal of the basis for federal jurisdiction. *Id.*

Obviously, Roberts would have been wiser to plead so that her case could not have been removed in the first place. But, even if she attempted to amend solely to avoid federal question jurisdiction, the district court's remedy is not to prohibit

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[14] *See, e.g., Minor v. Northville Pub. Sch.*, 605 F.Supp. 1185, 1201 (E.D.Mich.1985) ("[F]iling a motion for leave to amend after prompting by opposing counsel's motion for dismissal is not bad faith as intimated by the defendant here.") (citing *Hildebrand v. Honeywell, Inc.*, 622 F.2d 179 (5th Cir.1980)); *Adams v. Beland Realty Corp.*, 187 F. Supp. 680 (E.D.N.Y.1960) (after removal based on diversity, plaintiff's motion to substitute for corporate defendant defendant's successor partnership, a non-diverse party, held proper because no prejudice shown; case then remanded to state court for lack of jurisdiction).

amendment, but to retain jurisdiction of the state law claim after amendment.[15] We do not believe that federal jurisdiction is a quicksand in which, plaintiff having haplessly wandered in, she remains trapped because of the district court's refusal to permit escape. Likewise, we do not believe that such a plaintiff who appears to be pursuing a particular cause of action is precluded from modifying her pleadings so as to express a different cause of action, if the new theory fits with the facts of her case.[16]

Second, delay and prejudice to defendant were at a minimum in this case. Permitting Roberts to change her complaint by deleting a paragraph is quite different from permitting a plaintiff to add a claim which raises new theories or alleges new facts, which necessitates further discovery. Permitting deletion in this case would conceivably cause a slight delay and prompt a new round of summary judgment motions. This minimal effect cannot justify the district court's refusal to permit the deletion in light of Rule 15(a), which requires that leave to amend be "freely given."

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[15] It is settled law that the district court may exercise jurisdiction over a pendent state law claim, even after the basis for removal to federal court has been eliminated, if recommended by a careful consideration of factors such as judicial economy, convenience, fairness, and comity. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

[16] We reiterate, however, that we do not approve of Roberts's counsel's approach in this case. On the contrary, the poor drafting of the complaint in this case caused the problem in the first place, and many months passed before any attempt was made to correct patent problems with the complaint. But, we are bound to follow the applicable principles of law, even if doing so creates the appearance that we approve of counsel's handling of the matter.

**8 Although one might believe that for efficiency's sake we should affirm the summary judgment entered in Mazda's favor based on the unlikelihood that Roberts will ultimately prevail in this case, we do not find that such an approach would be proper when the remaining state law claim is at least legally cognizable. Of the two primary paragraphs that remain in count I (paragraphs 25 and 27), paragraph 25 may state a cause of action under Michigan law. Mich.Comp.Laws Ann. § 418.301(11) (1991) (Mich.Stat.Ann. § 17.237(301)(11)) provides:

A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

If Roberts can show that she was terminated because she filed a workers' compensation claim as it appears that paragraph 25 alleges, she can state a claim under this statute.

Accordingly, we find that the district court abused its discretion in refusing to permit the deletion of paragraph 26.

2. First motion to amend

With regard to the August 21 motion to amend, we affirm the denial of that motion on other grounds. The district court has no duty to permit amendments which would fail to state a claim and thus be futile. We find that permitting Roberts to add the language she requested, "Defendant discriminated against Plaintiff by harassing her, giving her job assignments in violation of her restrictions after reporting her work-related

injuries," would be futile because the new language does not state a valid claim under section 418.301.

With this new language, Robert alleged that she was discriminated against for her assertion of a work related injury. The problem here is that the alleged harassment and the giving of work in violation of her medical restrictions occurred before she filed a workers' compensation claim. Section 418.301(11) does not recognize a cause of action for discrimination that occurs prior to the filing of a workers' compensation claim. *See Griffey v. Prestige Stamping, Inc.*, 473 N.W.2d 790 (Mich.App.1991); *Ashworth v. Jefferson Screw Prods., Inc.*, 440 N.W.2d 101 (Mich.App.1989), leave denied, 433 Mich. 873 (1989); *Wilson v. Acacia Park Cemetery Ass'n*, 413 N.W.2d 79 (Mich.App.1987). Because this first motion to amend would have added an allegation that did not state a claim, we affirm the district court's denial of it.

3. Second motion to amend

The November 25 motion to amend sought to add a new claim arising out of a new occurrence, i.e., the allegedly improper notice of termination. Delay would be significant with this amendment because of the new allegation it made. Further discovery would have to be conducted. And, it appears that adding this particular claim would be futile because the notice requirements are either spelled out in the CBA, in which case the claim is probably preempted, or are non-existent, in which case the claim is likely meritless. Because of these facts, we cannot say that the district court abused its discretion, and we affirm the denial of the second motion to amend.

D. Other Issues

**9 We address only briefly the district court's summary judgment on counts II and III. Roberts does not contest the dismissal of count III, and finding solid ground for the dismissal, we affirm the district court's ruling on that issue. We also affirm the dismissal of count II because Roberts only feebly contests its dismissal, and we find sufficient grounds for affirmance.[17]

III

For the foregoing reasons, we AFFIRM the district court's dismissal of counts II and III, the denial of the August 21 motion to amend, and the denial of the November 25 motion to amend. We REVERSE the denial of Roberts's motion to delete paragraph 26 and the summary judgment entered on count I of the complaint, and we REMAND for further proceedings consistent with this opinion.

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[17] We also note that at the district court Roberts had consented to the dismissal of count II if count I survived Mazda's preemption argument. Since we reverse the district court's summary judgment on count I because that count is not preempted, we find that Roberts has no bona fide objection to our affirmance of the dismissal of count II.

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the publication and citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.

Leon SANDERS, Plaintiff-Appellant,
v.
HUGHES AIRCRAFT CO., Defendant-Appellee.

No. 93-56378.

Submitted May 24, 1994.[1]
Decided May 27, 1994.

Appeal from the United States District Court for the Central District of California, No. CV-93-02426-RJK; Robert J. Kelleher, District Judge, Presiding.

C.D.Cal.

AFFIRMED.

Before: HUG, D.W. NELSON, and FERNANDEZ, Circuit Judges.

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[1] The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a); 9th Cir.R. 34-4. We therefore deny the parties' request for oral argument.

App. 6.2

MEMORANDUM[2]

**1 Leon Sanders appeals pro se the district court's dismissal of his action for breach of contract and wrongful termination. The court dismissed the action pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief may be granted. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *see California Elec. Co. v. Briley*, 939 F.2d 790, 792 (9th Cir.1991), cert. denied, 112 S. Ct. 1478 (1992), and affirm.

I
Breach of Contract

In support of his claim for breach of contract, Sanders alleged that defendant Hughes Aircraft Company ("Hughes") violated the collective bargaining agreement between Hughes and Sanders's union. As the district court correctly held, Sanders's breach of contract claim is preempted by section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. *See Milne Employees' Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1408 (9th Cir.1991), cert. denied, 113 S. Ct. 2927 (1993) (state-law claim preempted by section 301 of LMRA if claim requires interpretation of collective bargaining agreement). While Sanders correctly argues that the LMRA does not preempt a state claim for retaliatory termination based on an employee's filing for workers' compensation benefits, *see Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406-07

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[2] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.

(1988), that argument is irrelevant to the question of whether the LMRA preempts Sanders's breach of contract claim.[3]

The district court also correctly held that Sanders's claim is barred by the six-month statute of limitations applicable to claims against an employer for breach of a collective bargaining agreement. *See DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 155 (1983) (six-month statute of limitations contained in section 10(b) of National Labor Relations Act applicable to LMRA claims). The union informed Sanders by the end of September 1992 that it would not pursue his grievance against Hughes. The statute of limitations began running at that time because Sanders then knew or should have known that the union had stopped pursuing his grievance. *See Harris v. Alumax Mill Prods., Inc.*, 897 F.2d 400, 404 (9th Cir.) (holding that limitations period began running when union informed employee that union would not pursue grievance), cert. denied, 498 U.S. 835 (1990); *Carter v. Smith Food King*, 765 F.2d 916, 919 n. 2 (9th Cir.1985) (statute of limitations for section 301 actions begins running when employee knows or has reason to know union has quit pursuing grievance). Sanders did not file his complaint until April 27, 1993, almost a month after the statute of limitations expired. Therefore, his claim is time-barred.

Sanders's contention that he was unsure whether the union would pursue his grievance is belied by the unambiguous language of the union's September 23, 1992 letter which states, in pertinent part, that "the motion was made and concurred with

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[3] Moreover, as discussed in part II, infra, Sanders's retaliatory termination claim is barred under Cal.Labor Code § 132(a).

not to pursue this grievance any further."[4] Moreover, the fact that Sanders's other grievances may not yet be settled does not support Sanders's contention because Sanders filed those grievances after the district court announced it was dismissing this action.[5]

**2 In sum, the district court did not err by holding that section 301 of the LMRA preempts Sanders's breach of contract claim and that, as such, his claim is barred by the statute of limitations.[6]

II
Retaliatory Termination

Sanders's complaint indicated that this claim was in part based on alleged violations of the collective bargaining agreement by Hughes. To that extent, Sanders's claim is preempted by

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[4] Normally, in reviewing a dismissal for failure to state a claim we confine our review to the contents of the complaint. Sanders attached the union's letter to his complaint, however. Therefore, we properly may consider it on appeal. *See Holden v. Hagopian*, 978 F.2d 1115, 1118 (9th Cir. 1992) (court may consider complaint and all materials properly attached thereto).

[5] To the extent Sanders is complaining about these later grievances, Sanders has not alleged nor is there any evidence that he has exhausted his contractual grievance procedures. *See Carr v. Pacific Maritime Ass'n*, 904 F.2d 1313, 1317 (9th Cir. 1990), cert. denied, 498 U.S. 1084 (1991).

[6] Although not raised on appeal, Sanders argued in district court that the statute of limitations was tolled when he filed an unfair labor practice charge with the National Labor Relations Board. This argument lacks merit. *See Conley v. International Bhd. of Elec. Workers, Local 639*, 810 F.2d 913, 915 (9th Cir. 1987).

section 301 of the LMRA and barred by the statute of limitations. *See supra*, part I.

In his complaint, Sanders alleged that Hughes terminated him in retaliation for his filing of a workers' compensation claim. In California, the exclusive remedy for an employee who alleges such a retaliatory termination is to file a petition with the Workers' Compensation Appeals Board ("WCAB").[7] Cal.Labor Code § 132(a); *Portillo v. G.T. Price Prods., Inc.*, 182 Cal.Rptr. 291, 292-94 (Cal.Ct.App.1982); *see also Taylor v. St. Regis Paper Co.*, 560 F.Supp. 546, 549 (C.D.Cal.1983). Therefore, the district court correctly dismissed Sanders's retaliatory termination claim.[8]

II

Other Contentions on Appeal

On appeal, Sanders contends the district court should have entered a default judgment against Hughes. This contention lacks merit. There is no indication in the record that Sanders requested entry of default against Hughes. Moreover, the record shows that Hughes timely filed its motion to dismiss. *See* Fed.R.Civ.P. 12 & 55(a). Thus, Sanders would not have been entitled to a default judgment.

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[7] In fact, the record shows that Sanders filed a petition with the WCAB.

[8] Sanders's reliance on *Ortiz v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 852 F.2d 383 (9th Cir. 1988) is misplaced. Ortiz did not involve the issue of whether Cal.Labor Code § 132(a) provides the exclusive remedy for the type of retaliatory termination claim Sanders alleged. Moreover, Sanders's contractual claims in this case are barred by the LMRA and not by a workers' compensation settlement, as was the case in Ortiz. *See* 852 F.2d at 387-88.

Sanders also contends that the district court committed judicial misconduct and that he has filed a complaint against the district court judge. Again, Sanders never asked the district court judge to recuse himself. In addition, Sanders's dispute with the judge appears to be based solely on adverse rulings by the judge. This is not enough to support a finding that the judge was biased against Sanders. *See Taylor v. Regents of Univ. of Cal.*, 993 F.2d 710, 712 (9th Cir. 1993) (per curiam), cert. denied, 114 S. Ct. 890 (1994).

AFFIRMED.

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA1 Rule 36.1 and FI CTA1 Rule 36.2 for rules regarding the publication and citation of unpublished opinions.)

United States Court of Appeals,
First Circuit.

Leanders H. SMITH, Plaintiff, Appellant,
v.
WGBH EDUCATIONAL FOUNDATION,
INC., Defendant, Appellee.

No. 93-1213.

September 27, 1993

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Leanders H. Smith on brief pro se.

Alan D. Rose, Diane G. Rosse, Marilee Denelle and Nutter, McClennen & Fish on brief for appellee.

D.Mass.

AFFIRMED.

Before Breyer, Chief Judge, Selya and Boudin, Circuit Judges.

Per Curiam.

**1 Leanders H. Smith sued WGBH Educational Foundation, Inc. (WGBH) in state court, alleging that it had violated his rights under Massachusetts' workers' compensation laws, M.G.L. ch. 152, §§ 75A, 75B, when it refused his request to return to work after being on a disability leave during which he had received compensation benefits. WGBH removed Smith's action to federal district court, and moved for summary judgment, which the district court granted. Smith is appealing that order as well as orders denying motions that the court disqualify itself from hearing Smith's case, remand his case to the state court, and permit certain depositions to proceed. We affirm for the reasons stated in the district court's orders, and elaborate only as necessary to clarify the court's briefly stated reasons.

1. Removal/Preemption. In *Magerer v. John Sexton & Co.*, 912 F.2d 525 (1st Cir. 1990), we held that a retaliatory discharge claim brought under M.G.L. ch. 152, § 75B, was completely preempted under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), where the plaintiff was subject to a collective bargaining agreement which contained a management rights clause giving the employer/defendant the right to "discharge employees for proper cause." Since the definition of "proper cause" under the agreement could permit employer discharges not permitted under section 75B, we found that the rights and obligations of Magerer and his employer were controlled by the contractual provisions governing discharge and not by any independent state standard found in the workers' compensation laws of Massachusetts. *Id.* at 530. In so doing, we relied on the specific language in section 75B, which provided that, if the rights granted employees under that section were inconsistent with a collective bargaining agreement, the agreement was to prevail. The collective bargaining agreement between WGBH

and the National Association of Broadcast Employees and Technicians (NABET) contains essentially the same clause as the one we considered in *Magerer*. Article XIX of the agreement provides that "[t]he right to discipline and discharge employees for just cause shall remain the prerogative of [WGBH]." Thus, under *Magerer*, Smith's section 75B claim requires interpretation of the collective bargaining agreement and for that reason it is completely preempted under section 301 of the Labor Management Relations Act. *Id.*

The district court's conclusion that Smith's state law claims were preempted was also correct with respect to Smith's claim under section 75A. Like section 75B, section 75A states that an applicable collective bargaining agreement which is inconsistent with the rights granted in section 75A is to prevail over section 75A. Section 75A grants a preference in hiring to any former employee who has lost a job due to a compensable injury under workers' compensation over other applicants not employed at the time when such former employee seeks to be rehired. As a general matter, Article 13.1 of WGBH's collective bargaining agreement gives WGBH "the sole and exclusive right to make all decisions regarding the management, operation and programming of [its] operations, including determination of the number of employees covered by this Agreement," suggesting that WGBH may hire or not hire employees as it sees fit and that it is not required to grant any preference to former employees who have lost their employment due to injuries compensable under Massachusetts' workers' compensation law. More specifically, Article 17.3 of the agreement requires WGBH to rehire laid-off employees according to seniority. For certain types of available work, moreover, Article 3.7(a) also states a hiring preference based on seniority for regular staff employees who have been laid off. The seniority principle for rehiring laid-off employees is

inconsistent with section 75A's hiring preference for employees laid off or discharged because of injuries compensable under Massachusetts' workers' compensation law. Thus, under the reasoning of *Magerer*, Smith's section 75A claim requires interpretation of the collective bargaining agreement and for that reason it, too, is completely preempted.

**2 Since Smith's claim is completely preempted under section 301, it states a federal claim and thus arises under federal law, *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987); *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968); Magerer, 912 F.2d at 528, and not under Massachusetts law. Consequently, 28 U.S.C. § 1445(c), which prohibits the removal to federal court of claims arising under a state workmen's compensation law, does not apply, and removal of the claim here was proper. *See Vantine v. Elkhart Brass Manufacturing Co.*, 762 F.2d 511, 517-18 (7th Cir. 1985) (section 1445(c) did not bar removal of a claim brought under a state's workmen's compensation laws; under the state's laws, the cause of action arose under the collective bargaining agreement and thus stated a federal claim under section 301 which rendered removal to the district court proper); *Smith v. Union Carbide Corporation*, 664 F. Supp. 290, 292 (E.D. Tenn. 1987) (section 1445(c) did not bar removal of an action brought under a state's workmen's compensation law because the plaintiff's suit was an independent, judicially created tort action, and so did not arise under the state's workmen's compensation laws, and because it was preempted by federal labor law and therefore arose under federal and not state law).

2. Smith's Employment Status as of August 1989. If Smith was subject to WGBH's collective bargaining agreement, dismissal of his suit was proper since his only remedy for his

discharge was resort to the grievance and arbitration procedures of that agreement. *See Allis-Chalmers Corporation v. Lueck*, 471 U.S. 202, 220-21 (1985). In affidavits, Smith claimed that his employment at WGBH had ended before August 1989 and that he was not subject to the WGBH-NABET collective bargaining agreement. Accordingly, he argues that he was not bound by a 1990 arbitral decision which found that WGBH had discharged him for just cause, and he says that he is free to sue in court. In view of the overwhelming evidence to the contrary, we find that his allegations do not establish the existence of a genuine issue of material fact sufficient to defeat WGBH's motion for summary judgment. *Petitti v. New England Telephone & Telegraph Co.*, 909 F.2d 28, 30 (1st Cir. 1990) (summary judgment is proper if evidence is so one-sided that one party must prevail as a matter of law).

Smith claims that his employment had terminated before August 1989 under Article 17.2(f) of the collective bargaining agreement. That article provided for loss of seniority by employees absent from work due to injury for more than 15 months, and was understood by the parties to terminate the employment of such employees. As of August 1989, Smith had been on disability leave for more than 15 months, having begun his leave in February 1986. In an affidavit, WGBH's Human Resources Director, Michael Enwright, who negotiated WGBH's 1987-90 contract with NABET, stated that WGBH had accepted the union's demand during those negotiations that Smith be excluded from the operation of Article 17.2(f). Smith's disability leave began in 1986, when the 1984-87 contract was in effect, and Enwright stated in his affidavit that that contract did not contain Article 17.2(f). Smith has not introduced any affidavit by the union to the contrary, nor has he denied Enwright's sworn statement that the 1984-87 contract did not contain Article 17.2(f).

**3 In an affidavit, Smith states that John Plausse, his direct supervisor, had told him during his leave that he was not subject to the collective bargaining agreement. Nevertheless, the pleadings, affidavits and underlying documentary evidence submitted by the parties show conclusively that, even if Plausse had told Smith that he was not subject to the collective bargaining agreement, Smith knew that his employment with WGBH had not been terminated before August 1989 and that he continued to be subject to the collective bargaining agreement. Among the many pieces of evidence, we highlight only the following: Smith's complaint stating that on or about November 22, 1989, WGBH had refused to allow him to "return to work"; Smith's letter to WGBH on August 2, 1989, notifying Enwright that Smith was changing his "return to work" date from September 18, 1989, to September 1, 1989, telling Enwright to let Plausse know of the change so that Plausse could make necessary plans, asking Enwright whether his vacation time had been adjusted and informing Enwright that he would be taking the first two weeks of October off; the arbitration transcript which reveals that the union arbitrated Smith's November 22, 1989 discharge (for misconduct not at issue here), that Smith was consulted about and approved NABET's and WGBH's selection of an arbitrator, and that Smith attended the arbitration on dates in 1989 and 1990 and actively assisted the union in presenting evidence on his behalf; and Smith's affidavit stating that he is still a member of NABET, a critical admission since membership in the union is a condition of employment under the collective bargaining agreement. See Agreement Between NABET and WGBH Educational Foundation, Inc. 1987-1990, Art. 3.1. Although Smith argues that certain letters and documents show that he was not an employee for any purpose under the collective bargaining agreement during his leave, those letters and documents show only that he was not classified as an "active"

employee at that time and thus did not have the rights granted active employees under the agreement (e.g., vacation, sick leave, and holiday benefits). The collective bargaining agreement distinguishes clearly between the rights of active employees and those of non-active employees on leave of absence (*see, e.g., id.* Art. 9.5(c), 9.7; Art. XII); nowhere does it suggest that non-active employees on leave are not in the bargaining unit or not subject to the grievance and arbitration provisions of the contract.

Smith's other claims are without merit for the reasons stated in the orders being appealed.

Affirmed.

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the publication and citation of unpublished opinions.)

Patrick THORNTON, Plaintiff-Appellant,

v.

DENNY'S INCORPORATED, Defendant-Appellee.

No. 92-1368.

United States Court of Appeals, Sixth Circuit.

April 29, 1993.

On Appeal from the United States District Court for the Eastern District of Michigan, No. 91-10110, Cleland, J.

E.D.Mich.

AFFIRMED.

Before MARTIN and SILER, Circuit Judges, and COFFIN, Senior Circuit Judge.[1]

PER CURIAM.

**1 Patrick Thornton appeals the district court's grant of summary judgment for Denny's Inc. in this employment

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[1] The Honorable Frank M. Coffin, Senior Circuit Judge for the United States Court of Appeals for the First Circuit, sitting by designation.

dispute. Thornton alleged age discrimination, constructive discharge, retaliatory discharge for filing a workmen's compensation claim, and breach of a just-cause employment contract. For the following reasons, we affirm the district court.

In May 1983, Patrick Thornton, then forty-eight years old, applied for employment at Denny's, Inc. On his written application, Thornton indicated that he was willing to relocate. In June 1983, Thornton was hired by Denny's to be an assistant manager. For the first three months of employment, Thornton attended a manager-in-training program at the Twelve Mile & Woodward restaurant in Berkley, Michigan. He also assisted workers at three other Denny's restaurants in the area. After successfully completing the training program, Thornton was assigned to the only Denny's restaurant in Saginaw, Michigan. Thornton was supervised by Daniel Hoffman, the restaurant manager, and Michael Hartman, the district manager.

In 1988, Denny's management personnel changed in the area. Art Boudakian became the district manager for the district that contained the Saginaw restaurant. Hoffman resigned from his position, and George Dempsey, who had been in the same position as Thornton, was promoted to become the new restaurant manager. Thornton had a difficult working relationship with Dempsey, who initially gave Thornton a poor performance review. Boudakian intervened and scheduled another review, and Thornton met performance standards on the second review.

In 1989, Thornton refused to sign two critical memos regarding his work. The first memo discussed the occurrence of guests walking out on his shift. Thornton refused to sign the memo because he had brought the matter to his supervisor's attention.

The second memo described a discrepancy on a deposit slip filled out by Thornton. Thornton admitted that he had made a mistake but had said that the problem had been corrected and that there was no need to document it.

In April 1989, Thornton injured his back while moving stock at Denny's. Thornton filed a workers' compensation claim and remained on disability leave through June 12. Because Denny's has a self-administered workers' compensation plan, Denny's incurred the full charge for Thornton's injury.

On June 22, Thornton's supervisors notified him that he was being transferred, without a reduction in pay, from the Saginaw location to a Denny's restaurant thirty miles away in Flint. The transfer was to take effect on July 5. Thornton refused to sign the transfer memo and reported to work in Saginaw on the transfer date. Denny's did not permit Thornton to work in the Saginaw restaurant that day, and Thornton went home. Robert Clayton, Denny's Human Resources Manager, called Thornton to discuss his objections. When Thornton mentioned travel expenses, Clayton offered to relocate Thornton to Flint at the company's expense or to compensate Thornton for travel expenses from home to the Flint restaurant, but Thornton refused these offers. At Thornton's request, Denny's also looked into the possibility of transferring Thornton to Las Vegas, Nevada or Wichita Falls, Texas. However, there were no available positions in these locations.

**2 After Thornton refused to work in Flint, Clayton placed him on vacation and told him that if he did not begin working at the Flint restaurant by July 17, Denny's would terminate his employment for refusal to work. Thornton did not return to work at the Flint location, and Denny's ended his employment.

On February 28, 1991, Thornton filed a complaint in the Saginaw County Circuit Court in Michigan for wrongful discharge. On April 12, Denny's removed the case from the state court to the Michigan federal district court based on diversity of citizenship. Thornton's claim is based upon age discrimination, constructive discharge, retaliatory discharge for filing a workmen's compensation claim, and breach of a just-cause employment contract. Thornton's complaint seeks damages for wrongful discharge.

Upon proper motions, the district court granted summary judgment to Denny's and dismissed the case. On March 20, 1992, Thornton filed his notice of appeal.

Our first inquiry is whether the federal district court had jurisdiction to hear the merits of Thornton's case. Thornton contends that the district court lacked federal subject matter jurisdiction to hear the case because it arises out of Michigan workers' compensation law. Removal of state-law workers' compensation cases is prohibited even if there is diversity of citizenship. *See* 28 U.S.C. § 1445(c) ("a civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States"). However, we find that Thornton's claim does not arise under the Michigan worker's compensation law, Mich.Comp. Laws § 418.621 et seq. The worker's compensation statute provides neither the mechanisms nor the remedy for this type of suit. Consequently, the federal district court properly retained jurisdiction in this case because there is diversity of citizenship.

We now address the question of whether summary judgment was proper in this case. We review a grant of summary judgment de novo. *Faughender v. City of North Olmsted,*

Ohio, 927 F.2d 909, 911 (6th Cir. 1991). Under Fed.R.Civ.P. 56(c), summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Thornton contends that he has presented sufficient evidence to suggest that he may have been terminated as a result of age discrimination. Thornton alleges that Denny's discriminated against him on the basis of age in violation of Michigan's Elliott-Larsen Civil Rights Act, Mich.Stat.Ann. § 3.548 et seq. The Elliott-Larsen Act does not permit an employer to "discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term . . . of employment because of . . . age." To establish a prima facie case of age discrimination in violation of Michigan law, the plaintiff must present evidence that (1) he was a member of the protected class; (2) he was discharged; (3) he was qualified for the position; and (4) he was replaced by a younger person. *Matras v. Amoco Oil Co.*, 424 Mich. 675, 385 N.W.2d 586, 589 (1986). In addition, the plaintiff must show that age was the determining factor in the employer's decision to take action against the plaintiff. *Dubey v. Stroh Brewery Co.*, 185 Mich.App. 561, 564-65, 462 N.W.2d 758, 759-60 (1990).

**3 Thornton has failed to demonstrate a prima facie case of age discrimination because he has failed to present sufficient evidence of discriminatory motive to survive a motion for a directed verdict, as required by *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Thornton attempted to provide statistical evidence to show that Denny's was motivated to take action against him because of his age. The testimony that Denny's forced Thornton, its only manager over age fifty, to accept a forced transfer is of little value because such action against one individual is to small a sample to have statistical

value. In regard to his discharge, Thornton has presented no evidence to show that Denny's reason for the termination was even remotely based on age. The overwhelming evidence shows that Denny's reason for firing Thornton was that Thornton refused to go to work at the Denny's in Flint.

Thornton also contends that the transfer order constitutes constructive discharge. To show constructive discharge, plaintiff must present evidence that his working conditions were so intolerable that a reasonable person in the same situation would have felt compelled to resign. *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir.1982). In this case, Thornton admitted that there was little difference between the two restaurants, and Thornton was to receive the same salary. Therefore, the transfer was a lateral move, and Thornton failed to provide any indication of intolerable working conditions at either location. Consequently, he does not present evidence of constructive discharge which meets the Celotex standard.

Thornton also contends that a genuine issue exists regarding whether he was discharged in retaliation for filing a workers' disability compensation claim. To establish a prima facie case of retaliatory discharge, a plaintiff must demonstrate that (1) the plaintiff engaged in protected activity; (2) the employer knew of this; (3) the employer took an adverse employment action against the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action. *Polk v. Yellow Freight Systems, Inc.*, 876 F.2d 527, 531 (6th Cir.1989). It is undisputed that Thornton engaged in protected activity by filing a workers' compensation claim and that Denny's was aware of this filing. However, the transfer to Flint was not an adverse employment action because Thornton would have received no reduction in pay and was offered reimbursement for relocation or

commuting expenses. Even assuming that the transfer constitutes an adverse employment action, Thornton has failed to establish sufficient proof under Celotex that he was fired or transferred because he filed a workers' compensation claim.

Thornton also argues that he has put forward ample evidence to suggest that the forced transfer to Flint was actually an attempt to breach a just-cause employment contract and discharge him. A just-cause contract may be created either by expressed agreement or may result from an employee's legitimate expectations grounded in an employer's policy statement. *Toussaint v. Blue Cross and Blue Shield*, 408 Mich. 579, 599, 272 N.W.2d 880, 885 (1980). Thornton's claim is based on language in the employee handbook that was issued to Thornton at the start of his employment. The handbook provides that "all employees are treated equitably . . . and that no one is terminated without just cause." Thornton failed to establish that Denny's breached a just-cause employment contract by attempting to transfer him. The just-cause language applied specifically to terminations, not to attempts to transfer. There is no evidence that Thornton was terminated for any reason other than failure to work in the Flint restaurant, and we have already decided that the transfer order does not constitute constructive discharge. Refusal to work is a just cause for termination of employment. Consequently, Thornton has not put forward sufficient factual evidence which could survive a motion for a directed verdict at trial regarding whether Denny's breached Thornton's employment contract.

**4 The judgment of the district court is affirmed.

Supreme Court, U.S.
FILED
SEP 25 2000
OFFICE OF THE CLERK

No. 00-513

IN THE

Supreme Court of the United States

LEVI STRAUSS & CO.,

Petitioner,

v.

AGUSTINA TREVINO, HERMINIA HERRERA, BEATRIZ OLIVAREZ AND GLORIA GUAJARDO,

Respondents.

On Petition for Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

FILED
SEP 30 1996
Michael N. Milby
Clerk of Court

ENTERED
OCT 2 1996
Michael N. Milby
Clerk of Court

AGUSTINA TREVIÑO,	§	
HERMINIA HERRERA,	§	
BEATRIZ OLIVAREZ,	§	
and GLORIA GUAJARDO,	§	
PLAINTIFFS,	§	CIVIL ACTION NO.
	§	M-95-262
VS.	§	
	§	
LEVI STRAUSS & CO.,	§	
DEFENDANT.	§	

ORDER

This memorializes the Court's prior oral ruling on plaintiffs' motions to remand. Plaintiffs' initial Motion to Remand (Docket Entry No. 5) was premised on the contention that the only remaining claim being asserted in this action is a workers' compensation wrongful discharge claim that is nonremovable pursuant to 28 U.S.C. § 1445(c). Plaintiffs' Supplemental Motion to Remand (see Docket Entry No. 16) further asserts that the notice of removal filed by defendant Levi Strauss & Co. ("Levi Strauss") is defective in that unsigned copies of collective bargaining agreements were attached.

Levi Strauss opposes plaintiffs' motions and has submitted extensive briefing. Levi Strauss's principal contention is that plaintiffs' claims pursuant to the Texas Workers Compensation Act (Chapter 451 of the Texas Labor Code) are completely preempted by § 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 158. According to Levi Strauss, plaintiffs' claims are inextricably intertwined with collective bargaining agreements that governed the terms and conditions of each of the plaintiffs' employment with Levi Strauss. It is unnecessary to decide the LMRA preemption issue, however, in order to resolve plaintiffs' motions to remand.

"Whether the case was properly removed is determined by reference to the allegations in a plaintiff's state court pleading." Tedder v. F.M.C. Corp., 590 F.2d 115, 116 (5th Cir. 1979) (citation omitted). Here, plaintiffs' original state court petition included a claim for intentional infliction of emotional distress.[1] As plaintiffs' counsel has candidly acknowledged, the Fifth Circuit and other courts have routinely found such claims to be preempted when brought in the context of a collective bargaining agreement. See, e.g., Thomas v. LTV Corp., 39 F.2d 611, 619 (5th Cir. 1994) (citing cases). This is because such claims require an employee to prove wrongful conduct by the employer, which in turn requires interpretation of a collective bargaining agreement. Id. Such a circumstance is present here. In light of this, the Court concludes that, at the critical time of removal, plaintiffs' state court petition asserted at least one claim that was completely preempted by federal law and thus

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[1] After the case was removed to federal court, plaintiffs moved for leave to file amended pleadings that eliminated the intentional infliction of emotional distress claim.

the entire case was properly removable. See 28 U.S.C. § 1441(c).[2]

Accordingly, plaintiffs' motion to remand and supplemental motion to remand are DENIED to the extent that they claim that remand is mandatory under the circumstances of this case.

The Court will address by separate order whether plaintiffs' remaining retaliatory discharge claim is preempted by federal labor law, which is an issue raised by Levi Strauss's pending motion to dismiss. Depending on the resolution of this issue, it may be necessary to address whether discretionary remand is appropriate in this case. See 28 U.S.C. § 1367(c).

DONE this 30th day of September, 1996 at McAllen, Texas.

/s/

Peter E. Ormsby
UNITED STATES MAGISTRATE JUDGE

[2] Based on the record in this case, the Court finds no merit in plaintiffs' argument that removal was defective because Levi Strauss failed to submit with its notice of removal signed copies of the relevant collective bargaining agreements.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

ENTERED
FEB 20 1997
Michael N. Milby
Clerk of Court

AGUSTINA TREVIÑO,	§	
HERMINIA HERRERA,	§	
BEATRIZ OLIVAREZ,	§	
and GLORIA GUAJARDO,	§	
Plaintiffs,	§	
	§	C.A. M-95-262
vs.	§	
	§	
LEVI STRAUSS & CO.,	§	
Defendant.	§	

ORDER

After considering the pleadings on file, the argument of counsel, the applicable law, and for the reasons stated orally at the hearing held February 12, 1997, the Court enters the following rulings:

Defendants' Motion to Dismiss For Failure To Exhaust Grievance And Arbitration Remedies (Doc. No. 14) is DENIED.

Plaintiffs' Motion To Remand (Doc. No. 5) and Supplemental Motion To Remand (Doc. No. 16) were

previously denied to the extent those motions urged that remand is mandatory under the circumstances of this case. The motions are now DENIED to the extent they seek discretionary remand.

Defendants' Motion For Summary Judgment Against Plaintiff Herminia Herrera (Doc. No. 17), Motion For Summary Judgment Against Plaintiff Beatriz Olivarez (Doc. No. 18), Motion For Summary Judgment Against Plaintiff Agustina Treviño (Doc. No. 19), and Motion For Summary Judgment Against Plaintiff Gloria Guajardo (Doc. No. 19) are hereby DENIED without prejudice to defendants' right to reassert these motions after plaintiffs have had the opportunity to conduct further discovery.

Defendants' Motion For Leave To File Reply In Support Of Motion To Dismiss (Doc. No. 21) is GRANTED in that the Court has considered that brief in connection with these rulings.

Defendants' Motion For Dismissal With Prejudice of Claims Against Individual Defendant and Claims For Negligence and Intentional Infliction of Emotional Distress (Doc. No. 31) is unopposed and is GRANTED. It is hereby ORDERED that all claims against defendant Mike Ramos are DISMISSED and plaintiffs' claims alleging negligence and intentional infliction of emotional distress are likewise dismissed as to defendant Levi Strauss & Co. ("Levi Strauss").

Defendant Levi Strauss' motion to stay further discovery pending Court ruling on Motion To Dismiss (Doc. No. 42) was previously granted orally during a telephone conference on May 23, 1996. That stay of discovery is now lifted and the

case shall proceed as set out in the Scheduling Order entered this date.

DONE this 19th day of February, 1997 at McAllen, Texas.

/s/
Peter E. Ormsby
UNITED STATES MAGISTRATE JUDGE

App. 11.1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

ENTERED
OCT 17 1997
Michael N. Milby
Clerk of Court

AGUSTINA TREVIÑO,	§	
HERMINIA HERRERA,	§	
BEATRIZ OLIVAREZ,	§	
and GLORIA GUAJARDO,	§	
Plaintiffs,	§	CIVIL ACTION
	§	NO. M-95-262
vs.	§	
	§	
LEVI STRAUSS & CO.,	§	
Defendant.	§	

ORDER

Pending are defendant Levi Strauss & Co.'s renewed motions for summary judgment as to each plaintiff. The Court has carefully considered all the relevant pleadings on file, the argument of counsel, and the controlling law. For the reasons stated orally during the conference held August 25, 1997, the Court concludes that, viewing the summary judgment evidence in the light most favorable to plaintiffs, defendant is nevertheless entitled to judgment as a matter of law as to each plaintiff.

It is, therefore, ORDERED that each of the following motions is hereby GRANTED:

- Defendant's Renewed Motion for Summary Judgment Against Plaintiff Agustina Treviño (Doc. #61),
- Defendant's Renewed Motion for Summary Judgment Against Plaintiff Herminia Herrera (Doc. #62),
- Defendant's Renewed Motion for Summary Judgment Against Plaintiff Beatriz Olivarez (Doc. #63),and
- Defendant's Renewed Motion for Summary Judgment Against Plaintiff Gloria Guajardo (Doc. #64).

All other pending motions are DENIED as moot.

DONE this 15th day of October, 1997 at McAllen, Texas.

/s/

Peter E. Ormsby
UNITED STATES MAGISTRATE JUDGE

App. 12.1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

ENTERED
OCT 17 1997
Michael N. Milby
Clerk of Court

AGUSTINA TREVIÑO,	§	
HERMINIA HERRERA,	§	
BEATRIZ OLIVAREZ,	§	
and GLORIA GUAJARDO,	§	
Plaintiffs,	§	CIVIL ACTION
	§	NO. M-95-262
vs.	§	
	§	
LEVI STRAUSS & CO.,	§	
Defendant.	§	

FINAL JUDGMENT

For the reasons set forth in the Order entered this date and stated on the record at the conference held August 25, 1997, the Court renders final judgment for defendant on all claims and awards the defendant its costs.

DONE this 15th day of October, 1997 at McAllen, Texas.

/s/
Peter E. Ormsby
UNITED STATES MAGISTRATE JUDGE

7:95cv00262 #83 Pg

Supreme Court
FILED
NOV 2 2000
CLERK

(3)

No. 00-0513

In The

Supreme Court of the United States

LEVI STRAUSS & CO.,

Petitioner,

v.

AUGUSTINA TREVINO, HERMINIA HERRERA, BEATRIZ OLIVAREZ AND GLORIA GUAJARDO,

Respondents.

On Petition For Writ Of Certiorari From The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now come Augustina Trevino, Herminia Herrera, Beatriz Olivarez and Gloria Guajardo, Respondents, and submit this their Brief in Opposition to the Petition for Writ of Certiorari filed in this cause by Levi Strauss & Co., Petitioner.

STATEMENT OF THE CASE

A. Factual Background of Plaintiffs

Respondents disagree with the portion of Petitioner's Statement of the Case purporting to describe the "Factual Background of Plaintiffs." The characterizations contained therein are inaccurate. All four Respondents asserted retaliatory discharge causes of action based on having filed workers' compensation claims. Appendix, ¶ 9. Respondents did not mention or invoke the Collective Bargaining Agreement (CBA). Instead, it was *Petitioner* who invoked the provisions of the CBA in defense of its actions. Respondents uniformly asserted "that the true reason she was fired was because she in good faith instituted a claim and took other protected steps under the Workers Compensation Act." Appendix, ¶¶ 5-8.

Thus, this Court should not conclude, as Petitioner wishes this Court to conclude, that Ms. Trevino and Ms. Guajardo were "terminated pursuant to the CBA," nor

that Ms. Herrera and Ms. Olivarez were "terminated after [and because] she failed to provide a properly dated doctor's letter," Petitioners' Brief, pp. 5, 6. Instead, the very issue in dispute is whether, as Respondents allege, they were terminated in retaliation for filing workers compensation claims. At the removal/remand stage, however, the Respondents claims should be accepted as true.[1]

B. Brief Overview of Fifth Circuit Decision

Respondents strongly disagree with that portion of Petitioner's Statement of the Case entitled "Brief Overview of Fifth Circuit Decision" and stating "The Fifth Circuit failed to discuss any of the facts set forth above surrounding . . . the CBA provisions that underlie their workers' compensation discrimination claims." Petitioner's Brief, at p. 6. In fact, the Fifth Circuit did examine and discuss the application of the facts as alleged by Respondents, finding "The primary issue in this case is the factual question of motivation: Did the defendant fire the plaintiffs in retaliation for filing workers' compensation claims? The answer to this question is not dependent on an interpretation of the CBA. Plaintiffs have an independent right to file workers' compensation claims without fear of losing their jobs." Thus, in contrast to

---

[1] "Thus, with few exceptions, the cause of action upon which the removability of a case will be judged is whatever the plaintiff declares it to be in his or her pleadings and not what the plaintiff could have alleged, unless there is fraud or collusion," which neither exist nor were alleged by Petitioner. 29A Federal Procedure, L.Ed. § 69:61 (1998).

Petitioner's assertion that the Court ignored the facts surrounding the CBA, the fact is that the Fifth Circuit considered the CBA but found it not dispositive on the issue of Petitioner's intent in terminating Respondents, which is the relevant issue in a workers' compensation retaliation claim.

Additionally, the Fifth Circuit did not, as represented by Petitioner, "simply set out a bright line rule that workers' compensation discrimination claims, by their very nature, can never be preempted by § 301 of the LMRA." Petitioner's Brief, at p. 6. Instead, the Fifth Circuit issued a narrowly drawn opinion holding that the specific causes of action asserted in this case did not require interpretation of the CBA, and in fact exist independent of the CBA, so that the LMRA, and any preemption related to same, is inapplicable under the facts and allegations made in this case.

REASONS FOR DENYING THE WRIT

Certiorari should not be granted for several reasons. First, the conflict between the Circuits which is alleged is illusory since the cases cited can be reconciled. Second, Petitioner misreads the Fifth Circuit's opinion, which renders the nature of the legal issues presented by Petitioner for review inaccurate and/or improper. Third, the right result was reached below. Fourth, even if this Court felt that there were a conflict in the circuit opinions, the issue is not ripe for review.

SUMMARY OF ARGUMENT

Petitioner predicates review upon two propositions: (a) that the United States Fifth Circuit Court of Appeals erroneously concluded that a workers' compensation discrimination/retaliation claim arises under the State worker compensation laws and is therefore barred from removal by 28 U.S.C. § 1445(c)[2]; and (b) that the Fifth Circuit has established an impermissible per se rule that workers' compensation discrimination claims can never be preempted by § 301 of the Labor Management Relations Act (LMRA). In both regards, Petitioner is incorrect.

First, courts are virtually unanimous in holding that a workers' compensation discrimination/retaliation claim arises under state workers' compensation law within the meaning of § 1445(c), *particularly* where, as here, the basis for such claim was established by statute, and even more particularly where the statute involved, as here, is part of the state's workers' compensation statutory scheme. Any other interpretation, including that posited by Petitioner, would fail to meet Congress' intent in enacting 28 U.S.C. § 1445(c), which includes: [1] stemming the flood of workers' compensation cases being removed to federal court; [2] restricting workers' compensation cases to state court because they involve purely local disputes implicating no federal concerns; [3] giving effect to federal rules of construction and principals of federalism by construing against removability; and [4] recognizing that federal

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[2] 28 U.S.C. § 1445(c) reads as follows: "A civil action in any State court arising under the workmens' compensation laws of such State may not be removed to any district court of the United States."

law determines the removability of an action, unfettered by local law definitions or characterization of the subject matter.

Second, the Fifth Circuit has established neither an *impermissible* rule nor a *per se* rule that workers' compensation discrimination claims can never be preempted by § 301. Instead, the Fifth Circuit held that, under the particular allegations and facts of this case, interpretation of the CBA was not required, and therefore that § 301 was inapplicable. As such, the Fifth Circuit's decision in this case does not conflict with the decision of other federal circuit courts holding that claims of workers' compensation discrimination are preempted by § 301 when they allege a breach of or require interpretation of a CBA; no such breach was alleged, nor is any such interpretation required in order to determine Respondents' claims for relief.

ARGUMENT AND AUTHORITIES

I. The Fifth Circuit Correctly Concluded That a Worker's Compensation Discrimination Claim In Texas Arises Under The State Worker Compensation Laws and Is Therefore Barred From Removal By 28 U.S.C. § 1445(c)

A. Case Law Supports the Fifth Circuit's Decision

Courts are virtually unanimous in joining the Fifth Circuit in holding that a workers' compensation discrimination claim arises under state workers' compensation law within the meaning of § 1445(c), particularly where,

as here, the basis for such claim was established by statute, and even more particularly where, as here, the statute involved is part of the state's workers' compensation statutory scheme. *Jones v. Roadway Express, Inc.*, 931 F.2d 1086, 1092 (5th Cir. 1991); *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1118 (5th Cir. 1998). C.f., *Patin v. Allied Signal, Inc.*, 77 F.3d 782, 787 (5th Cir. 1996) (distinguishing and finding removable a claim for breach of the duty of good faith and fair dealing in denying a workers' compensation claim because such claim was created by the common law, not by the state's workers' compensation act).

Thus, workers' compensation retaliation claims have been held not removable by the vast majority of courts to address the issue, including *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238 (8th Cir. 1995); *Reed v. Heil Co.*, 206 F.3d 1055 (11th Cir. 2000); *Suder v. Blue Circle, Inc.*, 116 F.3d 1351 (10th Cir. 1997); *Farrior v. Sodexho, U.S.A.*, 953 F. Supp. 1301 (N.D. Ala. 1997); *New v. Sports & Recreation, Inc.*, 947 F. Supp. 453 (S.D. Ala. 1996); *Subra v. CMS Therapies, Inc.*, 900 F. Supp. 407 (M.D. Ala. 1995); *Thorne v. WLR Foods, Inc.*, 111 F. Supp. 2d 744 (N.D. W.Va. 2000). All of these courts also explicitly recognize the distinction between workers compensation retaliation claims arising from a statute, which are not removable, and workers compensation retaliation claims arising under common law, which have been found, under limited circumstances, *potentially* removable in a few states (not including Texas). *Humphrey*, at p. 1245; *Suder*, at p. 1352; *Reed*, at p. 1059; *Subra*, at p. 410; *New*, at p. 457.

B. Statutory Design Supports Fifth Circuit Decision

Discrimination, including retaliation, for filing a workers' compensation claim is prohibited in Texas by Tex. Labor Code § 451.001 (Vernon 1996). This section, along with § 451.002 (Vernon 1996), which delineates the available remedies and burden of proof, and § 451.003 (Vernon 1996), which extends such remedies to include injunctive relief, comprise Subtitle B of the Texas Workers' Compensation Act. Subtitle A is titled "Texas Workers' Compensation Act." Subtitle B is titled "Discrimination Issues." Subtitle C is titled "Workers' Compensation Insurance Coverage for Certain Government Employees." Subtitles A, B and C are contained together in Title 5, titled "Workers' Compensation."

A review of these provisions, including the manner in which they are set out, makes it clear that they are complimentary pieces of a comprehensive plan to provide workers' compensation coverage. Thus, the court in *Jones v. Roadway Express, Inc., supra,* at 1092, acted correctly in treating workers' compensation retaliation claims as within the workers' compensation laws of the State, and thus not removable.

C. Policy Supports the Fifth Circuit's Decision

Any interpretation of retaliatory discharge claims as independent from the workers' compensation laws, including the interpretation posited by Petitioner, fails to meet Congress' intent in enacting 28 U.S.C. § 1445(c). This

intent includes: [1] stemming the flood of workers' compensation act cases being removed to federal court; [2] restricting workers' compensation act cases to state court because they involve purely local disputes implicating no federal concerns; [3] giving effect to federal rules of construction and principles of federalism by construing against removability; and [4] recognizing that federal law determines the removability of an action, unfettered by local law definitions or characterization of the subject matter. *Lackey v. Gateway Homes, Inc.*, 944 F. Supp. 870, 873 (N.D. Ala. 1996); *Farrior v. Sodexho, U.S.A.*, 953 F. Supp. 1301, 1304 (N.D. Ala. 1999), quoting *Roberts v. Beaulieu of America, Inc.*, 950 F. Supp. 1509 (N.D. Ala. 1996); *Thorne v. WLR Foods, Inc.*, 111 F. Supp. 2d 744, 745 (N.D.W.Va. 2000), quoting *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108, 61 S. Ct. 868, 85 L. Ed. 1214 (1941). In fact, some courts logically recognize and hold that a workers' compensation retaliation claim, whether or not codified as part of its workers compensation chapter, is "essential to the efficacy of [the] statutory worker's compensation scheme," and thus should not be removable. *Farrior v. Sodexho, U.S.A.*, 953 F. Supp. 1301, 1304 (N.D. Ala. 1999), quoting *Roberts v. Beaulieu of America, Inc.*, 950 F. Supp. 1509 (N.D. Ala. 1996). *See also Jones v. Roadway Express, Inc.*, 931 F.2d at 1092; *Thorne v. WLR Foods, Inc.*, 111 F. Supp. 2d at 748.

D. Petitioner's Authorities Inapposite

The cases cited by Petitioner are not contrary to the holdings cited above. Instead, the authorities cited by

Petitioner involve those few states where workers compensation retaliation claims arise under the common law, not statute, and constitute an independent tort. Such claims are held not to arise under the state's workers' compensation law. *Spearman v. Exxon Coal USA, Inc.*, 16 F.3d 722, 724 (7th Cir. 1994), *cert. den'd*, 513 U.S. 955 (1994) (analyzing Illinois law);[3] *Thornton v. Denny's Inc.*, 992 F.2d 1217 (table), 1993 WL 137078*2 (6th Cir., Apr. 29, 1993) (. . . "[Plaintiff's] claim does not arise under the Michigan workers' compensation law. . . . The workers' compensation statute provides neither the mechanisms nor the remedy for this type of suit.")

Nor should this Court read *Spearman* too broadly. Even cases adopting the spirit of *Spearman* recognize that its holding is inapplicable to a retaliatory discharge claim. *See*, e.g., *Arthur v. E.I. DuPont de Nemours & Co.*, 58 F.3d 121, 124-28 (4th Cir. 1995) (comparing a deliberate intentional acts statute and a workers compensation retaliatory discharge claim; an "action for retaliatory discharge is integrally related to the just and smooth operation of the workers' compensation system; it ensures that those seeking compensation benefits are not scared out of making claims;" thus, "the significant differences between a retaliatory discharge claim and [this] claim render the decisions remanding retaliatory discharge actions inapplicable here"). Likewise, courts adopting the *Spearman*

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[3] It should also be noted that a strong dissent was issued in *Spearman*, which opinion is consistent with Respondents' interpretation of *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988), and *Jones v. Roadway Express, Inc.* stated herein.

rationale recognize that its holding is applicable only in states where workers compensation retaliatory discharge claims are treated as common law, independent tort claims, unlike Texas. *Hanna v. Fleetguard, Inc.*, 900 F. Supp. 1110, 1118, 1122-23 (N.D. Iowa 1995).

II. The Fifth Circuit Has Not Established An Impermissible Per Se Rule That Worker's Compensation Discrimination Claims Can Never Be Preempted By § 301 of the Labor Management Relations Act (LMRA).

A. This Case Requires No Interpretation of The CBA, Nor Was It Invoked

Petitioner predicates its second basis for review upon the proposition that the claims brought by Respondents in this case require interpretation of the Collective Bargaining Agreement (CBA). See Petitioner's Brief, p. 16 ("*Trevino* also conflicts with decisions . . . which have held that claims of workers' compensation discrimination are preempted by § 301 *when they allege a breach or require interpretation of a CBA*"); p. 21 ("As demonstrated above, [these] Circuits have held that workers' compensation retaliation claims are preempted if adjudicating the claims *would require interpretation of a CBA* or if the Plaintiffs claim that a *provision contained in the CBA* discriminates against employees who have pursued workers' compensation claims."); p. 22 ("In *Trevino*, the Fifth Circuit determined that the Plaintiffs' claims that they were discriminatorily terminated because they pursued their rights under the workers' compensation laws were not

preempted *even though they involve the interpretation of detailed LOA provisions in the CBA*. This Court has not considered whether the workers' compensation discrimination claim of an employee *who was terminated in accordance with the LOA provisions in a CBA* is preempted by § 301").

This conclusion is erroneous. Petitioner misstates and misconstrues the holding of the Court of Appeals. As the Fifth Circuit recognized, and as Respondents have maintained throughout, Respondents' claims arise independent of the provisions of the CBA. As this honorable Court recognized in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 413, 108 S. Ct. 1877, 1885, 100 L. Ed. 2d 410, 423 (1988), state law is not always preempted when a workers' compensation claim is brought, but in fact is preempted only where the claim asserted "requires the interpretation of a collective-bargaining agreement". Where, as here, the right to be free from retaliatory discharge for pursuing workers' compensation exists independent of the CBA, as it did in *Lingle*, such right does not depend upon or originate in the CBA. C.f. *Decoe v. General Motors Corp.*, 32 F.3d 212, 216 (6th Cir. 1994) ("if the Plaintiff can prove all of the elements of his claim without the necessity of contract interpretation, then his claim is independent of the labor agreement"). Instead, the right would exist even if there were no CBA. In other words, this right exists to each employee individually, and does not arise solely because Respondents are members of a collective organization.

In fact, Respondents never invoked any provision of the CBA in their Petition, and neither was the CBA cited at any point in support of the Respondents' claims.

Instead, it is Petitioner who invokes the provisions of the CBA, not Respondents, and the provisions of the CBA are cited by Petitioner not to establish the basis of Respondents' recovery, but are instead invoked *in defense of* and *in purported justification of* Petitioner's actions.

B. Fifth Circuit Has Remained True to the Holding in *Lingle*

Notwithstanding opposing counsel's arguments to the contrary, the Fifth Circuit has maintained and enforced, not ignored, the holdings and distinctions recognized in *Lingle*. In *Jones v. Roadway Express, Inc.*, 931 F.2d 1086 (5th Cir. 1991), *rehearing den'd*, 936 F.2d 789 (5th Cir. 1991), the Fifth Circuit cited this Court's decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 413, 108 S. Ct. 1877, 1885, 100 L. Ed. 2d 410, 423 (1988), holding that § 301 preempts an application of state law only if such application requires the interpretation of a collective-bargaining agreement. Noted the Fifth Circuit, "Congress did not intend that section 301 should preempt 'state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.' " *Id.* at 1089. The *Jones* Court even extended this rule to circumstances beyond those in the present case, holding that, "A plaintiff's state law claims will not be preempted, even when they are 'intertwined' with a CBA, so long as they are not 'inextricably intertwined' with it. [Citations omitted] Indeed, either party may use a CBA to support the credibility of its claims." *Id.* at 1089.

In deciding that a claim under art. 8307c (now § 451.001, et seq. of the Labor Code) is not preempted, the *Jones* court stated as follows:

> As in *Lingle*, the basic issue in this case is whether a retaliatory discharge occurred. Resolution of this issue does not require an interpretation of the CBA. The trial court has to ascertain if retaliation was among the reasons for which Roadway dismissed Jones. [Citation omitted]. Roadway may have had other reasons, even reasons which the CBA justified, for dismissing Jones. But if retaliation was a factor, then for the purposes of Jones' article 8307c claim, an interpretation of the CBA is not inextricably intertwined with the state-law claim. As this court has earlier noted, however, [citation omitted], we do not require that the CBA be irrelevant to the dispute; either party may still use the CBA to support the credibility of its claims.
>
> Furthermore, *the right to be free from retaliatory discharge for pursuing workers' compensation exists* for Jones, as it did for the employee in *Lingle, independently of the CBA*. The right originates in the statute which Texas has enacted to protect employees seeking compensation for work-related injuries. It does not depend upon any right or duty originating in the CBA. Jones' right would exist even were there no CBA. The right that Jones claims accrues to employees "as individual workers, not as members of a collective organization."

Id. at 1090.

In this case, as in *Jones*, Respondents' claims are not dependant upon an interpretation of the CBA; "[r]ather,

Plaintiff's right to be free from retaliation is grounded in Texas statute, and not the CBA." *Garcia v. Rainbo Baking Co. of Houston*, 18 F. Supp. 2d 683 (S.D. Tex. 1997). Respondents established a prima facie case of retaliatory discharge by showing that they were discharged after filing their workers compensation claims. C.f. *Decoe v. General Motors Corp.*, 32 F.3d 212, 216 (6th Cir. 1994) ("if the plaintiff can prove all of the elements of his claim without the necessity of contract interpretation, then his claim is independent of the labor agreement"). The CBA appears nowhere on the face of Respondents' complaint, nor is an action under the CBA implied or stated. Instead, it was Petitioner who invoked the CBA in defense of its actions.[4]

Thus, there is no escaping the fact that, were the CBA completely eliminated from this case, Respondents would still have a basis for asserting their cause of action. Thus, Petitioner's strawman argument that the Fifth Circuit has somehow ignored or overturned precedent requiring pre-emption where interpretation of a CBA is involved is inapplicable to this case, where such interpretation is *not* involved.

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[4] Respondents admit that they *responded* to the defense raised by Petitioner under the CBA, i.e. the leave of absence provision, but this does not transform this into a preempted cause of action. As noted, Courts "do not require that the CBA be irrelevant to the dispute" in order to require remand. *Jones v. Roadway Express, supra* at p. 1090.

C. Petitioner's Strawman Argument Rebutted

Petitioner is likewise erroneous in alleging that "*Trevino*, in affect, holds that a workers' compensation retaliation claim can never be preempted," Petitioner's Brief, p. 13, and that "[t]he Fifth Circuit failed to discuss any of the facts set forth [in Petitioner's Brief] surrounding Plaintiffs' discharges or the CBA provisions that underlie their workers' compensation discrimination claims. Rather, the Court simply set out a bright line rule that workers' compensation discrimination claims, by their very nature, can never be preempted by § 301 of the LMRA." Petitioner's Brief, p. 6. Petitioner is in error. First, the Fifth Circuit spent a significant amount of time presenting and discussing the underlying claims and its analysis of same before concluding that the Respondents' claims were independent of, and not intertwined with, interpretation of the CBA. *See Trevino v. Ramos*, 197 F.3d 777, 778-781 (5th Cir. 1999). Second, the Fifth Circuit's opinion indicates that it was not precluding the possibility that, in other factual circumstances, a contrary result might be reached. In fact, given different circumstances, the Fifth Circuit *has* found preemption. *See, e.g., Medrano v. Excel Corp.*, 985 F.2d 230 (5th Cir.), *cert. den'd*, 510 U.S. 822 (1993), wherein the plaintiff was claiming that application of a provision in the CBA discriminated against him in violation of § 451, and *Thomas v. LTV Corp.*, 39 F.3d 611, 620 (5th Cir. 1994), in which the plaintiff "repeatedly testified that the basis for his wrongful discharge claim was the interpretation and application of the [Attendance Probation Agreement]." *See also Jones v. Roadway Express, Inc.*, 936 F.2d 789 (5th Cir. 1991), where

the Court distinguished the claims in *Thomas* and *Medrano* as "arising under" the CBA, holding:

> In *Thomas* and *Medrano*, the plaintiffs relied solely on the CBA to support their retaliatory discharge claims. *See Thomas*, 39 F.3d at 621; *Medrano*, 985 F.2d at 233-34. In the case at bar, the Plaintiff does not rely on the CBA in his complaint, and his deposition testimony does not explicitly indicate that a provision of the CBA is the sole basis of his retaliatory discharge claim.

In effect, Petitioner is asking this court to overturn the intent of Congress because Petitioner finds it to be unreasonable. Petitioner complains that "by concluding the workers' compensation discrimination claim 'arises under' a state's workers' compensation laws within the meaning of § 1445(c), *Trevino* effectively deprives a federal district court of removal jurisdiction over such claims." However, this appears to have been Congress' express, and exact, purpose. The purpose of 28 U.S.C. § 1445(c) was and remains to stop the plethora of cases being removed to federal court. The narrow interpretation of this provision posited by Petitioner is contrary to this stated purpose. For this reason, the Fifth Circuit stated that Congress did not intend that § 301 should preempt " 'state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.' " *Jones v. Roadway Express, Inc.*, 931 F.2d at 1089.

D. Petitioner's Authorities Distinguished

The Supreme Court decisions cited by Petitioner are not in conflict with the Fifth Circuit's decision in this

case. Petitioner's citation to *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucus Flour Co.*, 369 U.S. 95, 103 (1962), cited for the proposition that "the court held that a state court suit *alleging a CBA violation* must be brought under § 301 and must be resolved by reference to federal law" is inapposite to this case, wherein Respondents are not alleging a violation of the CBA, and instead allege a right independent of the CBA, i.e. the statutory right not to be discriminated or retaliated against for having filed a workers' compensation claim.

Likewise, the holding in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-11 (1985), cited for the proposition that "the Court extended the preemptive effect of § 301 beyond suits alleging contract violations *to suits involving the interpretation of a CBA*," Petitioner's Brief at pp. 13-14, is inapposite to this case where, again, Respondents' claims do not involve interpretation of a CBA, but assert rights independent of a CBA.

Finally, the holding in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), obviously is not in conflict with the holding in this case. Although Petitioner argues that the *Lingle* Court "reaffirmed the broad and preclusive effect of § 301 preemption when a state law claim requires interpretation of a term in a CBA," Brief at p. 15, and further argues that preemption occurs if "resolution of a state-law claim depends upon the meaning of a Collective-Bargaining Agreement," Petitioner's Brief at p. 16, neither point is applicable to this case, wherein recognition of Respondents' rights does not depend upon the meaning of the Collective Bargaining Agreement.

Petitioner is likewise incorrect in asserting that the Fifth Circuit's decision in this case conflicts with the decisions of other federal circuit courts. For example, in the First Circuit cases of *Magerer v. John Sexton & Co.*, 912 F.2d 525 (1st Cir. 1990); *Smith v. WGBH Educational Foundation, Inc.*, 7 F.3d 218, 1993 WL 375816 (1st Cir. Sept. 27, 1993); and *Martin v. Shaw's Supermarkets, Inc.*, 105 F.3d 40 (1st Cir.), *cert. den'd*, 522 U.S. 818 (1997), all relied on by Petitioner and all involving Massachusetts law, retaliatory discharge claims were, by the express terms of the Massachusetts statute, subject to the terms of any CBA. *Magerer*, at p. 529-30. Additionally, the First Circuit held in these cases that the management rights clause in the CBA provided standards that governed the underlying retaliatory discharge claim, *Magerer* at 530; *Martin*, at 43, and further found that the CBA and workers' compensation law in Massachusetts were or may be in conflict. *Smith*, at *1; *Martin*, 105 F.3d at 44. In other words, as Petitioner admits, "because Plaintiff's claim *required interpretation of the CBA*, the court held that it was preempted," Petitioner's Brief, at p. 18, and "because the *management rights clause was arguably inconsistent with the statute*, the Court would have to construe the CBA to decide the claims." Petitioner's Brief, at p. 18. Such interpretation is not required in this case, wherein Respondents' rights exist independent of the CBA and are not in conflict with the CBA.[5]

---

[5] Likewise, the CBA in this case did not contain a "management rights" clause and the statute does not incorporate same, both of which were true in *Magarer, Martin* and *Smith*.

The same is also true of the Court's holding in *Roberts v. Autoalliance Int'l, Inc.*, 996 F.2d 1216 (table), 1993 WL 210717 (6th Cir. June 15, 1993). In that case, the Sixth Circuit held that "this provision made the plaintiff's claim dependent on the CBA because *the district court would have to interpret the CBA* to reach the Plaintiff's claim." Petitioner's Brief, at p. 19, quoting *Roberts v. Autoalliance Int'l, Inc.*, at *5. No such interpretation is required in this case, where, as the Fifth Circuit noted, "The right originates in the statute which Texas has enacted. . . . It does not depend on any right or duty originating in the CBA. [Plaintiff's] right would exist even were there no CBA." *Jones v. Roadway Express, supra* at 1090.

Illuminating is the Court's discussion in *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238 (8th Cir. 1995). Although Petitioner is correct in noting that the *Humphrey* Court declined to adopt a rule that a claim which arises under a state's workers' compensation law is per se nonremovable under § 1445(c), this holding is neither novel nor in conflict with Fifth Circuit precedent, which also recognizes that claims unlike those involved in this case (such as claims where the plaintiff is invoking the CBA, e.g., *Medrano v. Excel Corp., supra; Thomas v. LTV Corp., supra,* or where the Plaintiff's claim originated at common law, e.g. *Patin v. Allied Signal, Inc., supra* at 787), may be removable. More specifically, when addressing the claims which *are* similar to those in this case, the *Humphrey* Court held as follows:

> Under the plain meaning of the statute, where a state legislature enacts a provision within its workers' compensation laws and creates a specific right of action, a civil action brought to

> enforce that right of action is, by definition, a civil action arising under the workers' compensation laws of that state and therefore § 1445(c) applies; under such circumstances, the action would be non-removable, subject only to the complete preemption doctrine.

Humphrey, supra. Thus, quite in contrast to the proposition posited by Petitioner, *Humphrey v. Sequentia, Inc.* supports Respondents' position.

Finally, in the case cited from the Ninth Circuit, *Sanders v. Hughes Aircraft Co.*, 26 F.3d 132 (table), 1994 WL 227971 (9th Cir. May 27, 1994), "the court noted that the plaintiff's complaint indicated that his retaliatory termination claim *was in part based on alleged violations of the CBA*. [citations omitted]. The Court held that *to the extent the plaintiff's complaint indicated that his claim was partly based on alleged violations of the CBA,* his claim was preempted by § 301." Petitioner's Brief, at p. 21, quoting *Sanders v. Hughes Aircraft Co., Id.* at *2. Petitioner's own analysis of the holding in that case demonstrates that same is inapposite to the present holding.

E. Regardless, Certiorari Review Inappropriate

The cases cited by Petitioner are inapposite to the Fifth Circuit's holding in this case. However, even if these cases did stand for the propositions cited by Petitioner, they would still not merit review by this Honorable Court. The principles discussed have not yet reached the level of "maturity," ripeness or conflict warranting Supreme Court review.

CONCLUSION

Certiorari should not be granted for several reasons. First, the conflict between the Circuits which is alleged is illusory; the cases cited can be reconciled, particularly when the Court considers whether the claims asserted arose at common law and are independent of the workers' compensation law, or arose by statute and are integral to the workers' compensation scheme. Second, Petitioner misreads the Fifth Circuit's opinion, which renders the nature of the legal issues presented by Petitioner for review inaccurate and/or improper. *Inter alia*, the Fifth Circuit has not established a per se rule that workers' compensation discrimination and/or retaliation claims can never be preempted by § 301 of the LMRA. Third, for the reasons stated above, as well as the reasons stated by the Fifth Circuit Court of Appeals, the right result was reached below. Fourth, even if this Court feels there is a conflict in the Circuit opinions and that the other reasons posited by Respondents for denying certiorari are invalid, the issue is not ripe for review because the Circuit courts are still developing the law and distinctions important to a cohesive and comprehensive policy in this area.

PRAYER

Respondents pray that, for the reasons stated and/or in the interests of justice, the Petition for Writ of Certiorari sought by Levi Strauss & Co. be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

AGUSTINA TREVINO, HERMINIA HERRERA, BEATRIZ OLIVAREZ, AND GLORIA GUAJARDO	* * * * *	CIVIL ACTION NO. M-95-CV-262 JURY
VS.	* *	
MIKE RAMOS AND LEVI STRAUSS & CO.	* * *	

PLAINTIFFS' SECOND AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME, AGUSTINA TREVINO, HERMINIA HERRERA, BEATRIZ OLIVAREZ, AND GLORIA GUAJARDO, hereinafter referred to as plaintiffs, complaining of MIKE RAMOS AND LEVI STRAUSS & CO., hereinafter called by name or collectively as defendants, and for such cause of action, would respectfully show unto the Court and jury as follows:

A.

VENUE AND JURISDICTION

1. Plaintiffs, AGUSTINA TREVINO, HERMINIA HERRERA, BEATRIZ OLIVAREZ AND GLORIA GUAJARDO, are residents of Hidalgo County, Texas.

2. Defendant, MIKE RAMOS, is an individual residing in Hidalgo County who has been served with citation

and has appeared herein. No service is necessary at this time.

3. Defendant, LEVI STRAUSS & CO., is a foreign corporation formed under the laws of another state, that has been served with process and has appeared herein. No service is necessary at this time.

4. Venue is proper in Hidalgo County, Texas in that the incidents the basis of this cause of action occurred in Hidalgo County and plaintiff further resides in the county.

B.

FACTUAL ALLEGATIONS

5. *Agustina Trevino:* Plaintiff Agustina Trevino accepted employment with Levi Strauss & Co. During her employment, plaintiff performed all of the duties assigned to her with loyalty, dedication and hard work. On or about February 9, 1994, while in the course of her employment with Levi Strauss & Co., plaintiff received an on the job injury. Plaintiff Agustina Trevino thereafter, took steps towards beginning her workmen's compensation claim when she reported her injury to her employer and later sought medical treatment for such injury. Due to the nature of these injuries defendant notified it's workmen's compensation carrier to pay for plaintiff's medical expenses. On or about March, 1995, plaintiff was wrongfully discharged by Mike Ramos, a managment employee of the defendant corporation. Plaintiff Agustina Trevino asserts that the true reason she was fired was because she in good faith instituted a claim and took

other protected steps under the Workers Compensation Act.

6. *Herminia Herrera*: Plaintiff Herminia Herrera accepted employment with Levi Strauss & Co. During her employment, plaintiff performed all of the duties assigned to her with loyalty, dedication and hard work. On or about May 05, 1994, while in the course of her employment with Levi Strauss & Co., Plaintiff Herminia Herrera received an on the job injury. Plaintiff thereafter, took steps towards beginning her workmen's compensation claim when she reported her injury to her employer and later sought medical treatment for such injury. Due to the nature of these injuries defendant notified it's workmen's compensation carrier to pay for plaintiff's medical expenses. On or about January 11, 1995, plaintiff was wrongfully discharged by Mike Ramos, a managment employee of the defendant corporation. Plaintiff Herminia Herrera asserts that the true reason she was fired was because she in good faith instituted a claim and took other protected steps under the Workers Compensation Act.

7. *Beatriz Olivarez*: Plaintiff Beatriz Olivarez accepted employment with Levi Strauss & Co. During her employment, plaintiff performed all of the duties assigned to her with loyalty, dedication and hard work. On or about May 11, 1995, while in the course of her employment with Levi Strauss & Co., plaintiff received an on the job injury. Plaintiff Beatriz Olivarez thereafter, took steps towards beginning her workmen's compensation claim when she reported her injury to her employer and later sought medical treatment for such injury. Due to the nature of these injuries defendant notified it's

workmen's compensation carrier to pay for plaintiff's medical expenses. On or about January 11, 1995, plaintiff was wrongfully discharged by Mike Ramos, a managment employee of the defendant corporation. Plaintiff Beatriz Olivarez asserts that the true reason she was fired was because she in good faith instituted a claim and took other protected steps under the Workers Compensation Act.

8. *Gloria Guajardo*: Plaintiff Gloria Guajardo accepted employment with Levi Strauss & Co. During her employment, plaintiff performed all of the duties assigned to her with loyalty, dedication and hard work. On or about June, 1993, while in the course of her employment with Levi Strauss & Co., plaintiff received an on the job injury. Plaintiff Gloria Guajardo thereafter, took steps towards beginning her workmen's compensation claim when she reported her injury to her employer and later sought medical treatment for such injury. Due to the nature of these injuries defendant notified it's workmen's compensation carrier to pay for plaintiff's medical expenses. On or about June 06, 1994, plaintiff was wrongfully discharged by Mike Ramos, a managment employee of the defendant corporation. Plaintiff Gloria Guajardo asserts that the true reason she was fired was because she in good faith instituted a claim and took other protected steps under the Workers Compensation Act.

D.

WRONGFUL DISCHARGE (8307)

9. This lawsuit has been filed to remedy the wrong done to plaintiffs which arose from their exercise of their rights under the Workers Compensation Act and Article 8307c (Now Tex. Labor Code, Section 451.001). For injuries they received, in the course and scope of their employment, plaintiffs did in good faith take steps towards instituting a proceeding as well as other protected steps under the Worker's Compensation Act. Having been discriminated against, plaintiffs seek full redress for all the damages they have incurred. Plaintiffs allege that there was no legitimate business justification for Plaintiff's termination in that Plaintiffs had always performed an excellent job for the Defendant and that there was work available that the Plaintiffs could perform. Plaintiffs assert that the true reason they were fired was because they in good faith instituted a proceeding and filed a claim under the Texas Worker's Compensation Act. Plaintiffs further assert and intend to prove that the treatment they received was a pattern and practice engaged in by the Defendant corporation towards the Plaintiffs and others similarly situated. This unwritten plan or scheme was to discriminate and/or terminate against employees for taking protected steps under the Worker's Compensation Act.

E.

DAMAGES

10. *Actual Damages:* As a result of the incidents described above, that made the basis of this suit, plaintiffs have incurred damages in the following respects:

a. *Lost Earnings*: At the time of the incident complained of, plaintiffs were gainfully employed. As a proximate result of the wrongful acts of the defendant, plaintiffs were unable to attend to their occupations and thereby suffered loss of income for which they hereby sue. In all reasonable probability their loss of income will continue long into the future, if not for the balance of plaintiffs' natural life, all to their damage for which they hereby sue.

b. *Past and Future Mental Anguish*: As a result of the incidents described above, made the basis of this suit, plaintiffs have suffered mental pain and anguish. In all reasonable probability, plaintiffs will continue to suffer such mental pain and anguish for a long time into the future, if not for the balance of their natural lives.

12. [sic] *Exemplary Damages*: The conduct of the defendants, set out above, was carried out and constituted such an entire want of care as to constitute a conscious indifference to the rights or welfare of the plaintiffs. Plaintiffs are entitled to recover exemplary damages to deter such cruel and undignified procedures by the defendant in the future. Accordingly, plaintiffs request that exemplary damages be awarded against the defendants.

F.

PRAYER

WHEREFORE PREMISES CONSIDERED, plaintiffs pray that the Honorable Court grant the following:

a). Judgment against Defendants, jointly and severally, for Plaintiffs' damages;

b). Punitive Damages;

c). Prejudgment interest as allowed by law;

d). Interest on said judgment at the legal rate from date of judgment;

e). For costs of suit herein;

f). Such other relief as the Court deems proper.

Respectfully submitted,

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ATTORNEY FOR PLAINTIFF

Supreme Court, U.S.
FILED
NOV 1 ∧ 2000
CLERK

(4)

No. 00-0513

IN THE

Supreme Court of the United States

LEVI STRAUSS & CO.,

Petitioner,

v.

AGUSTINA TREVIÑO, HERMINIA HERRERA,
BEATRIZ OLIVAREZ AND GLORIA GUAJARDO,

Respondents.

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

LEVI STRAUSS & CO.,

Petitioner,

v.

AGUSTINA TREVIÑO, HERMINIA HERRERA,
BEATRIZ OLIVAREZ AND GLORIA GUAJARDO,

Respondents.

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

Preliminary Statement

Respondents' Brief in Opposition makes a gallant effort to try and explain away the Fifth Circuit's erroneous ruling in *Treviño*; especially the conflict it has created among the circuit courts. Their effort fails, however, because *Treviño* is, as Petitioner has stated in its opening brief, an erroneous and inconsistent decision that should be reversed. Interestingly, Respondents' Brief in Opposition also fails to address significant points in the petition. This reply brief will address the glaring errors in Respondents' brief and in doing so, further support the decision to grant the Petition for Writ of Certiorari in this case.

Argument

I. The Fifth Circuit Erroneously Concluded That a Workers' Compensation Discrimination Claim "Arises Under" the State's Workers' Compensation Laws and Is Therefore Barred from Removal by § 1445(c).

A. Respondents' Assertion That the Treviño Decision Does Not Conflict with Decisions From the Sixth and Seventh Circuits is Incorrect.

Contrary to the Fifth Circuit's decision in this case, both the Sixth and Seventh Circuit Courts of Appeals, have held that workers' compensation retaliation claims do not arise under the applicable state workers' compensation laws. *See Thornton v. Denny's, Inc.*, No. 92-1368, 1993 WL 137078 (6th Cir., Apr. 29, 1993) and *Spearman v. Exxon Coal USA, Inc.*, 16 F.3d 722 (7th Cir. 1994), *cert. denied*, 513 U.S. 955 (1994). In their Brief, Respondents argue that the Fifth Circuit's decision in *Treviño* does not conflict with these decisions because they "involve those few states where workers' compensation retaliation claims arise under the common law, not statute, and constitute an independent tort." Respondents' Brief at pp. 8-10. Respondents' argument is simply incorrect.

1. Sixth Circuit

In *Thornton*, the workers' compensation retaliation cause of action at issue was statutorily based. In 1985, Michigan added § 418.301 to the Michigan Workers' Compensation Disability Act, thereby creating a statutory cause of action for retaliatory discharge. The specific statutory language provides, in pertinent part:

> A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

Mich. Comp. Laws Ann. § 418.301(11) (West 2000). Additionally, Michigan courts have specifically recognized that this retaliatory discharge cause of action is statutorily created. In *Phillips v. Butterball Farms Co., Inc.*, 531 N.W.2d 144, (Mich. 1995), the Michigan Supreme Court recognized that:

> A claim for retaliatory discharge under the WDCA is **statutorily provided** . . . Thus, a **statutory duty** is created on the part of the employer not to discharge an employee in retaliation for the employee's filing of a workers' compensation claim.

(Emphasis added) Id. at 147 n.17. The court went on to note that, "this right against retaliatory discharge does not stem from any term agreed upon by the contracting parties, but from public policy now expressed in a statute." *Id.* at 147. *See also, Dunbar v. Department of Mental Health*, 495 N.W.2d 152, 156-57 (Mich. Ct. App. 1992) ("A claim for retaliatory discharge under the WDCA is statutorily provided . . . Thus, a statutory duty is created on the part of the employer not to discharge an employee in retaliation for the employee's filing of a workers' compensation claim."). As is readily apparent, the workers' compensation retaliation cause of action in *Thornton* was in fact statutory.

2. Seventh Circuit

In *Spearman*, the Seventh Circuit considered a workers' compensation retaliation claim under Illinois law. At that time, the Illinois workers' compensation law contained a statutory prohibition of workers' compensation retaliation, but provided no civil remedy. The statute provided in part:

> It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company, to discharge or to threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of the exercise of his or her rights or remedies granted to him or her by this Act.

820 Ill. Comp. Stat. Ann. 305/4(h) (West 2000). While the language in the statute did not expressly provide a private right of action, the Illinois Supreme Court determined that such an action existed, noting that, "where a statute is enacted for the benefit of a particular class of individuals a violation of its terms may result in civil as well as criminal liability, even though the former remedy is not specifically mentioned." *Kelsay v. Motorola*, 384 N.E.2d 353, 359 (Ill. 1978).

This cause of action has come to be known as the *Kelsay* tort in the state of Illinois. Although the elements of this cause of action and the damages recoverable have developed through case law over several years, the basic employer prohibition on retaliation is contained in the Illinois workers' compensation statute. Moreover, in *Spearman*, the Seventh Circuit explicitly recognized that its holding conflicted with the Fifth Circuit on this issue: "[t]he fifth circuit has since gone into conflict with [the Seventh Circuit], although it does not appear to have recognized that it was doing so." *Spearman*, 16 F.3d at 723.

Further, even if the cause of action in *Spearman* was completely common law with absolutely no statutory basis, this would not change the fact that the circuits are in conflict over this issue. Whether a workers' compensation retaliation cause of action is created by statute or common law, is not determinative of whether it "arises under" the workers' compensation laws for purposes of 28 U.S.C. § 1445(c). The statutory versus common law distinction is a difference without substance because the two causes of action have the same purpose of protecting employees who have been injured on the job, require essentially the same proof to prevail on a cause of action and provide essentially the same remedies. Workers' compensation retaliation claims in both Michigan and Illinois are nearly identical to workers' compensation retaliation claims in Texas. Accordingly, there is no principled basis for holding that a claim in Texas "arises under" the workers' compensation law while a nearly identical claim in Michigan or Illinois does not.

Finally, as the Petition for Certiorari points out, the legislative history of § 1445(c) clearly establishes that in enacting the statute, Congress was concerned with workers' compensation **benefit** claims, not discrimination claims. Petition of Certiorari at pp. 8-9. Respondents' complete failure to address this point in their Brief is a tacit admission, that when § 1445(c) was adopted, it was not intended to cover workers' compensation discrimination claims arising under statutes like Texas Labor Code § 451.001.

II. The Fifth Circuit Has Established an Impermissible Per Se Rule That Workers' Compensation Discrimination Claims Can Never Be Preempted by § 301.

A. Respondents Are Wrong in Their Assertion that the Fifth Circuit Spent a Significant Amount of Time Presenting and Discussing the Underlying Claims.

The facts surrounding Respondents' terminations are undisputed; specifically, Respondents Guajardo, Herrera and Olivarez failed to renew their leaves of absence while Respondent Trevino was unable to return to work from her leave of absence after 12 months. It is also undisputed that the Respondents' employment was governed by a CBA in effect at the time and that the CBA contained detailed provisions regarding leaves of absences, the process and time period involved in renewing such leaves and the maximum amount of time an employee could be off work on leave. Yet nowhere in the Fifth Circuit's opinion is there any discussion regarding these facts or how Respondents' terminations would or would not involve an interpretation of the CBA. Instead, the Court simply concluded that workers' compensation claims by their nature, can never be preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). This per se rule is in direct conflict with a line of cases from this Court which have addressed and recognized the preemptive effect of § 301.

B. There is no Factual or Legal Basis to Respondents' Assertion that Their Claims Arise Independent of the Provisions of the CBA.

Respondents make a concerted effort to avoid the preemptive affect of § 301 by alleging that their "claims arise

independent of the provisions of the CBA." In fact, they claim that they "never invoked any provision of the CBA in their Petition, and neither was the CBA cited at any point in support of the Respondents' claims." Respondents' Brief at p. 11. These assertions are simply not true.

First, it is well settled that Respondents cannot avoid the grievance and arbitration procedure of a CBA by artful pleading. *See e.g., IBEW v. Hechler*, 481 U.S. 851, 859 n. 3 (1987) ("when a state law claim is substantially dependent on analysis of a collective bargaining agreement, a plaintiff may not evade the pre-emptive force of Section 301 . . . by casting the suit as a state-law claim."); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-11 (1985) (question involving interpretation and application of CBA must be made by reference to federal law, whether questions arise in context of suit for breach of contract or in suit alleging liability in tort; "[a]ny other result would elevate form over substance and allow the parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract").

Moreover, in this case, Respondents not only expressly invoked the CBA in their deposition testimony, but they did so in their Fifth Circuit Brief.

1. Respondents' Deposition Testimony.[1]

- **Augustina Treviño:** She was terminated pursuant to Article XI § 1 of the CBA because she exceeded the maximum leave period of 12 months. She claims that the CBA provision limiting LOA's to 12 months is unfair to injured employees and thus discriminates against them, thereby

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[1] Relevant excerpts from Respondents' deposition testimony are attached at Appendix A.

requiring interpretation of the CBA because her termination was unquestionably taken in accordance with the provisions of the CBA. Trevino Dep. at 106:23-107:4. She also claims that LS&CO. discriminated against her by not giving her light duty or accommodating her under art. V § 8 of the CBA. *Id.* at 89:11-18, 109:3-22.

- **Gloria Guajardo:** She claims that her termination violated art. XI § 1 of the CBA (requiring employees to renew their LOA's every 30 days) because the doctor's letter she submitted to renew her LOA should have put LS&CO. on notice that she would be unable to return to work at the end of the 30-day period. Guajardo Dep. at 106:25-108:1; 117:20-118:12; 136:1-4. Her claim thus turns on the correct interpretation of art. XI § 1--does it require an employee to renew her 30-day LOA when it expires, or can a doctor's letter indefinitely extend a LOA beyond the 30-day period specified in the CBA? Guajardo also claims that LS&CO. violated its light duty policy and art. V § 8 of the CBA, which governs accommodations. *Id.* at 136:9-16; 138:6-14.

- **Herminia Herrera:** Herrera, who was terminated after she failed to provide a properly dated doctor's letter that specified the expected dates for her return, claims that LS&CO. discriminated against her by "the way" it "enforced . . . and interpreted [the LOA] policy." Herrera Dep. at 145:21-146:4. Her claim requires interpretation of art. XI § 2 of the CBA, to determine whether her LOA request complied with the CBA requirements that "requests for leave must be in writing" and that the "Company may require proof of evidence of illness, including a doctor's certificate." Herrera also claims that LS&CO. should have accommodated her, *Id.* at 155:6-20, thereby requiring interpretation of art. V § 8 of the CBA.

- **Beatriz Olivarez:** Olivarez was terminated after she failed to renew an 8-day LOA. Her § 451 claim is based on her interpretation of the CBA that all LOA's are 30 days in length. Olivarez Dep. at 107:5-111:6; 113:5-25. This requires interpretation of art. XI § 1 of the CBA, which permits LOA's "upon written request **not to exceed thirty (30) days.**" (emphasis added).

2. *Respondents' Fifth Circuit Brief.*[2]

Respondents' Fifth Circuit brief is replete with claims that Plaintiffs' terminations either violated or require interpretation of the CBA. *E.g.*: p. 20 (claiming that Respondents' terminations violated art. XI § 4 of the CBA ("return rights"), that LS&CO. misinterpreted CBA provision, and Plaintiffs' "interpretation" is correct one); p. 21 n.6 (claiming LS&CO. violated CBA's accommodation provision); p. 10 (contending that in extending Olivarez' LOA for 8 days (as she requested), LS&CO. "failed to extend Ms. Olivarez the **customary 30 days**" (emphasis added), thereby requiring interpretation of art. XI § 1, which permits LOAs "not to exceed thirty (30) days"); p. 11 (challenging Guajardo's termination because she "submitted a doctor's note which she believed satisfied the leave of absence extension requirements," thereby requiring interpretation of art. XI § 2, which specifies LOA extension prerequisites); pp. 7, 12 (challenging Petitioner's interpretation of the LOA provision in the CBA); p. 24 (claiming that *Treviño* "raised a fact issue as to whether LS&CO. violated its own absence policy in refusing to return her to a position other than her former job"); and pp. 7, 26 (contending that Petitioner violated the light duty policy in the CBA).

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[2] Relevant excerpts from Respondents' Fifth Circuit Brief are attached at Appendix B.

Conclusion

This Court should grant the Petition for Writ of Certiorari because *Treviño* not only decides an important question of federal law but also conflicts with the decisions of this Court as well as other Circuit Courts of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

Relevant Excerpts From Respondents' Deposition Testimony

A. Augustina Trevino

Q: And you also thought it was discrimination against you when they wouldn't give you light duty a year later, right?

A: When they were firing me and they weren't giving me an opportunity.

Q: So the answer is yes?

. . .

A: Yes.

. . .

Q: Is it your belief, Mrs. Treviño, that having a 12-month time limit on leave of absence was unfair to people with on-the-job injuries?

. . . .

A: Yes, I think so.

. . .

Q: Were you aware that Levi had a special program to provide a special job assignment in certain situations?

A: No.

Q: I will represent to you, Mrs. Trevino, that Exhibit No. 18 is Levi Strauss's accommodations policy which was in force at the time of you termination.

. . .

Q: Do you think that Levi should have considered you for this type of special job assignment?

A: I think so.

Augustina Trevino Deposition at pp. 89:11-18; 106:23-107:4; 109:3-22.

B. Gloria Guajardo

Q: . . . Are you saying that Levi knew as of June 4, 1994 that you couldn't work?

A: Yes, they knew.

Q: And that's because you had given them the medical excuse from Dr. Sanchez, correct?

A: Yes.

. . . .

Q: Do you understand that Levi says they terminated you because you did not comply with the leave of absence policy?

. . . .

A: Well, I was not ready to work yet.

Q: So are you saying that you had complied with the policy?

A: Yes.

Q: Because you had told them that you still couldn't work on that date?

A: It wasn't what I was saying but what the doctor was saying, the evaluation that he did.

. . . .

Q: Doesn't Mr. Ramos's letter [of May 25, 1994], which is Exhibit No. 8, say in the second paragraph that . . . in his opinion, you had not contacted them to extend your leave of absence?

. . . .

A: Well, yes, because he mentioned that there.

Q: You disagreed with that, didn't you? You thought that you had complied with the policy; isn't that right?

A: Yes.

Q: You thought that you had already requested an extension of your leave of absence; isn't that right?

A: Well, yes, because they had already had with them all of that information from the doctor.

. . . .

Q: So you thought the policy [requiring a written LOA request] was unfair, correct?

A: Well, not unfair, but I thought that what I had turned in was correct, was in accordance with what the policy required.

Q: . . . Do you believe that Levi Strauss . . . should have tried to find you light duty or modified duty job instead of terminating you in June of 1994?

A: Yes.

Q: And because Levi didn't do that, do you think they discriminated against you?

A: Yes.

. . . .

Q: Do you think Levi should have found a different job for you instead of terminating you?

. . . .

A: Yes.

Q: That they should have given you special consideration because you had a serious injury and had been a long-time employee?

. . . .

A: Yes.

Gloria Guajardo Deposition at pp. 106:25-108:1; 117:20-118:12; 136:1-4; 136:9-16; 138:6-14.

C. Herminia Herrera

Q: Well, do you think that the way they enforced this policy and interpreted this policy was part of the discrimination and harassment that you're complaining about?

. . . .

A: Yes.

. . .

Q: Instead of terminating your employment in January, what do you think Levi's should have done for you?

. . .

A: Help me out. Try me out at another position. Train me. I don't know, performing another type of work. Somehow I believe that they should have helped me out.

Q: So do you think they should have given you some special consideration and found another type of work for you?

. . .

A: Yes.

Herminia Herrera Deposition at pp. 145:21-146:4; 155:6-20.

D. Beatriz Olivarez

Q: And what date are you referring to?

. . .

A: 4-20-95. He had asked Alma Martinez on one occasion - - Alma Martinez, and Alma Martinez said, yes, to tell me and to mark it in a calendar that every 30 days to be current.

Q: Every 20 days or every 30 days?

A: No, that it would expire on the 20th, which equaled to 30 days.

Q: It's your understanding that that's what Alma told your husband?

A: Yes.

Q: That you had to extend every 30 days on the 20th of the month?

A: Yes.

Q: So were you going to extend again on May 20 ,1995? Is that when you were going to extend?

A: Well, not exactly on the 20th because it was on a weekend, and the paper expired on the 20th. It could be the day before or the day after.

. . .

A: But I would try for it to be before the 20th so I wouldn't have any problems.

Q: So you thought you had to renew on the 20th of each month; is that what you're saying?

. . .

A: Yes, because I was operated on on the 13th of March, and that's when Jorge Suarez called me, and he told me that I had missed some days for the extension and that they wanted to terminate me. That was in March. They operated on me on the 13th of March. That was on a Monday, and Jorge called me approximately on a Friday. And I couldn't move or anything, so my husband went to Dr. Pechero and got the letter for the 30-day extension, which was on the 20th or March. From there, Dr. Pechero, he took it directly to Levi's, gave it to Alma Martinez. Alma Martinez to him, "Tell her that that's the date it's going to be expiring, not to forget the 20th which equals, you know, the 30 days.

So my husband also asked Jorge Suarez, and Jorge Suarez told him the same thing, that it was every 30 days, and if I had taken it in on the 20th, so the next letter was going to be April 20th, and that's how I was basing myself and keeping current with the 30-day extension.

Q: After you husband got this extension for you on April 20, 1995, did you make a note somewhere to extend it on May 20, '95?

. . .

A: I wrote it on a calendar, that it had to be on the 20th day of each month.

Q: Did your husband tell you that your extension was going to expire on April 20, 1995?

A: No, because he had taken it on the 20th, and it couldn't expire in eight more days because if it's 30 days, it can't expire on the 28th.

Q: Are you saying your husband didn't know it was going to expire on April 28, 1995?

. . .

A: We knew that it would expire April 20th and we would have to take the extension in 30 days.

Q: When did you think you had to take another extension?

. . .

A: Every 30 days.

. . .

Q: And your leave of absence expired on February 28, 1995, didn't it?

. . .

A: The document was going to expire on the 20th of each month, which was the 30-day extension.

Q: Is it your understanding that your leave of absence expired on April 28, 1995, yes or no?

. . .

A: I understand that it expires on the 20th of each month, which is the 30-day, because I don't think it could have expired on the 28th. I think it was the 20th, and then eight days later.

Beatriz Olivarez Deposition at pp. 107:5-111:6; 113:5-25.

APPENDIX

Relevant Excerpts From
Respondents' Fifth Circuit Brief

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The summary judgment evidence also showed that Levi regularly failed to follow its own policies and procedures . . . The evidence likewise showed that Levi . . . terminated at least one Appellant (Agustina Trevino) on the ground that she was unable to perform the essential functions of her *former* job, **despite the fact that its Leave of Absence policy clearly contemplated the returning post-90 day absentees to positions of employment *other* than their former jobs** and that, in conformity with that provision, Levi had a policy of checking to see whether light duty work was available for employees who could *not* return to their former positions of employment.

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Ms. Olivarez was finally allowed to commence her leave of absence on January 19, 1995, and received three extensions (every thirty days on the 20th of the month) through April 28, 1995. CRR 1460. Her final extension was requested on April 20, 1995 but Flora Weaver, the Human Resources Assistant signing the LOA form, **failed to extend Ms. Olivarez the customary thirty days,** instead extending it only until April 28, 1995.

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Finally, on August 26, 1993, Ms. Guajardo was granted a leave of absence and was granted extensions through May 5, 1994,

CRR 1504, **when she submitted a doctor's note which she believed satisfied the leave of absence extension requirements**. CRR 1472-1475. Levi disagreed and notified her by letter dated June 6, 1994, that she had been terminated effective May 28, 1994 for failing to comply with the leave of absence extension requirements. CRR 1503.

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Contrary to the Magistrate's holding in this regard, however, **the summary judgment evidence revealed that the Leave of Absence policy did *not* require absent employees to return to their *former* jobs**, that other jobs were available, and that Levi had repeatedly failed to follow its own policies relating to the handling of the Appellants' injuries and claims, had repeatedly denigrated the Appellants' injuries and physical conditions, had falsely claimed that the reason for Appellant Trevino's discharge was that she, and not Levi, had violated the Leave of Absence policy . . .

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In the instant case, Levi's Leave of Absence policy clearly contemplated that employees returning to work after 90 days (but within 12 months of the commencement of their absence) would be given available positions of employment *other* than their former jobs. CRR 41-42, 73-74, 98. In setting forth those positions of employment to which employees were to be returned upon returning to work, **Article XI, Section 4 of Levi's Collective Bargaining Agreement specifically provided that: "an employee granted a leave of absence under this Article shall [only] be returned *to his machine* if he returns within 30 calendar**

days, and *to his same job if he returns within 90 calendar days.*" CRR 41-42, 73-74, 98.[5]

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The policy thus unmistakably contemplated returning post-90 day absentees to positions *other* than their former jobs. CRR 41-42, 73-74. Had the policy only contemplated returning employees to their *former* jobs, as Levi contends, it could not have at the same time *restricted* their right to return thereto after 90 days without effectively reducing the 12 month leave maximum to a 90 day maximum.

An interpretation of the policy to require post-90 day absentees to resume their former jobs would thus render the 90 day guarantee meaningless, and violate the settled rule that a court must adopt that interpretation which affords some consequence to each part of a contract. Chapman v. Orange Rice Mill Co., 747 F.2d 981, 983 (5th Cir. 1984); Coker v. Coker, 650 S.W.2d 391, 394 (Tex. 1983).[6]

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[5] **Although there were two Collective Bargaining Agreements that covered the periods involved in this lawsuit**--one covering January 27, 1992 until January 27, 1995, CRR 58-91, which provided that absences beyond 12 months resulted in "inactive status," CRR 74, and the other covering January 27, 1995 until January 27, 1996, CRR 23-56, which Levi claims resulted in automatic termination, CRR 41-42--the agreements were similar with regard to the status of employees returning within 30 and 90 days of injury and prior to the expiration of twelve months. See, **Return Rights" sections of the Agreements**. CRR 41, 74.

[6] **The policy further required that, before termination, "the parties hereto shall meet and discuss what, if any, *special* job assignment consideration such employee may need,"** CRR 47-48, 79, Ramos Depo., pp. 73-75. No such meetings, however, took place in the instant case. Appellants Guajardo, Olivarez and Trevino's attempts to hold

(continued...)

Nevertheless, when Agustina Trevino sought to return to work within the allotted 12 months she was refused that opportunity solely because she was not considered fit to perform the essential functions of her *former* job, to wit: "[a]t the time of her termination, [Agustina Trevino] *could* perform light duty, but could not

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Levi's own absence policy, which contemplated the return of post-90 day absentees to positions of employment *other* than their former jobs, together with its admissions that it refused Agustina Trevino re-employment solely because she could not perform "the essential functions of her *former* job" and that it did not know whether other work was available, **raised a fact issue as to whether Levi violated its own absence policy in refusing to return her to a position other than her former job.**

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It yet again revealed that Levi had, contrary to company policy, gotten angry when Trevino's doctor's excuse came from a general practitioner rather than a specialist, CRR 692, and that its office personnel repeatedly had made rude faces and sarcastic comments to Trevino when she went to the office for reasons related to her injury. CRR 714-717, Cf. Ramos Depo. at pp. 67-68.

Again, moreover, despite the fact that it was Levi's policy to look for light duty positions, Ramos Depo., pp. 21-22, 93;

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[6] (...continued)
such meetings were unsuccessful. CRR 390, 491, 602, 1702, 1718.

Valdez Depo., pp. 7-8; Martinez Depo., p. 22, **it also failed to do so on behalf of Plaintiff Trevino**. Ramos Depo., p. 75; Valdez Depo., pp. 24-25.